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Business Man's Commercial Law Library

Contracts — Highways — Farms

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By

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CHAPTER IV *(Continued)*

MODES OF LIMITED OWNERSHIP *(Cont.)*

§ 9. License

1. What is a license.
2. Kinds.
3. An executory license may be revoked.
4. A license can always be revoked where no party will suffer.
5. Death operates as a revocation.
6. When a license is executed the licensee is protected.
7. Can a license partly executed be revoked?
8. When the law implies a license to the purchaser.

1. A license is an authority to do an act or series of acts on another's land, without acquiring any estate or ownership therein. It includes authority to do whatever is necessary to accomplish the end desired. It may be created orally, as it conveys no interest in the land, but simply a permission to use or occupy. An eminent jurist once remarked, "the publican, the miller, the broker, the banker, the wharfinger, the artisan, or any professional man who ever licenses the public to enter his place of business in order to attract custom, is a licensor, but, when the business

is at an end, the license also comes to an end. Thus, one may open a way across his land for a public thoroughfare. Should he do so this would be regarded as a license for people to pass over the same."

2. Licenses are of two kinds; executory, in which an act is done; and executed, in which an act has been done. The distinction is important, as we shall soon discover.

3. An executory license may be revoked at the pleasure of the licensor. This is the law everywhere. Thus, A laid an aqueduct across B's land, who afterward revoked his license, and cut the pipe that conducted the water. A sought the interposition of a court of equity, which refused to interfere, declaring that B had a right to revoke the license at his pleasure.

Likewise, a license to cut a drain through the licensor's land, or build a culvert or dam, or flow land, or build and maintain a house, or lay water-mains, or cut trees, may all be revoked with respect to future action; but the licensee can remove his improvements.

Another example may be given: A land-owner erected a stand for spectators at a horse race, and sold tickets to all who wished to attend. Before the race was over the owner ordered one of the spectators to leave the premises, and afterward removed him. The court held that his ticket was a mere license which could be revoked at the owner's pleasure. The same rule has been applied in the case of a play at a theatre and a concert. But, if the purchaser suffers in any way by his removal, he is entitled to damages.

Another case may be mentioned — that of minerals

— in which a licensee, after having incurred great expense, was forbidden by the owner to mine any longer. The revocation was declared to be valid, and the licensee was without a legal remedy.

4. A licensor may always revoke his license when the parties would be left in the same condition as they were before granting the same. This principle may be readily applied to licenses to fish in water belonging to another, or to hunt in his park, or to use his carriageway.

5. It is also a rule of law that the death of either party works a revocation of a license. So does a transfer of the interest of either party in the subject-matter. Thus, oral permission was given by a land-owner, who sold the timber growing thereon to another to take it out by a particular way. Afterward, he sold his land without mentioning the license. The purchaser was not bound to observe it.

6. The execution of a license relieves or excuses the actor from liability, otherwise he might be considered a trespasser. Thus, one who licenses another to tear down a mill-dam, or lay an aqueduct in his land, or cut down a tree, has no cause of action against the others, though he may have been greatly injured. Nor does this permission invade the statute of frauds pertaining to land, as no interest is conveyed therein.

7. The most difficult question perhaps relates to the revocation of a license after the licensee has enjoyed or exercised the privilege and incurred expense — erected, perhaps, a costly structure on the licensor's land. The licensee's rights in all cases of this kind

are strictly construed. Thus, should a license be given to another to erect a dam, this would not convey authority to rebuild if it were destroyed.

In many of the states the courts maintain that a license by virtue of which the licensee has incurred expense — for example, has erected a dam for the purpose of operating a mill — is not revocable. This principle is founded on the doctrine that an executed license transfers an absolute right to the licensee, because, after revocation, he is not restored to his original condition. The contrary doctrine is founded on the idea that the licensee, if permitted to exercise a license beyond the control of the other party, acquires an interest in land without a writing, and thus infringes the statute of frauds. An answer to this may be made that there are ways of acquiring land without a writing of which adverse user is a daily illustration.

8. The purchaser of an article, stone, trees, or the like, has a reasonable time to remove them from the land of the seller, for an implied license is given to him to effect their removal; nor can the seller forbid him from exercising, within a reasonable period, this right. Again, one who licenses another to cut trees on his land, with the intention of carrying them away, cannot revoke the license to remove those already cut in part execution of the license. But a revocation before any of them had been cut would be effective.

§ 10. By Mortgage

1. What is a mortgage.

2. Mortgagor need not be absolute owner.
3. Full terms of agreement are usually expressed.
4. When absolute deed is only a mortgage.
5. Mortgage for future advances.
6. Mortgage of after-acquired property.
7. Mortgagor's remaining interest may be subject to levy.
8. Distinction between mortgage and right to purchase.
9. Secret agreements:
   (*a*) Between immediate parties,
   (*b*) Nature of mortgage cannot be changed by another simultaneous agreement,
   (*c*) Can be by subsequent agreement.
10. Relationship of simultaneous lienors.
11. Mortgage with power of sale.
12. Mortgagee cannot purchase at his own sale and extinguish equity of redemption.
13. He can purchase at officer's sale.
14. Deed of trust:
   (*a*) Nature and terms,
   (*b*) May be made to secure future advances.
15. Creation of mortgage by depositing title deeds.
16. Vendor may have lien:
   (*a*) Who is affected,
   (*b*) On what theory it rests,
   (*c*) Will prevail against assignment for benefit of creditors,
   (*d*) Notice of lien,
   (*e*) Part payment by vendee,
   (*f*) Does not arise in favour of third party who pays purchase money,

(*g*) Assignment of vendor's debt is an assignment of the lien,

(*h*) Sale of land to satisfy vendor's lien.

17. Equity of redemption may be mortgaged.
18. No mortgage without a debt.
19. Different theories concerning operation of mortgage:
    (*a*) By one, estate belongs to mortgagee,
    (*b*) By other, estate belongs to mortgagor.
20. Changes in form of indebtedness do not affect debt.
21. Both may insure premises.
22. Mortgagee's remedy against mortgagor for misuse of the estate.
23. Mortgagee, by purchasing equity of redemption, acquires entire interest.
24. Mortgage to secure different persons and debts.
25. Mortgage by different persons of distinct land to secure joint debt.
26. Mortgages take effect in order of registration.
27. How far a devise of land includes a mortgage.
28. Mortgagee's interest descends to his heirs.
29. When mortgagor can claim damages of public for taking his property.
30. How a mortgage affects a policy of insurance.
31. Mortgagor cannot be charged with rent.
32. Mortgagor cannot deny mortgagee's title.
33. Who can redeem a mortgage estate.
34. Entire mortgage must be paid to have that effect.
35. Sale of land extinguishes the lien.
36. Redemption by mortgagor.
37. Redemption by one of several interested persons.

38. Usury as a means of defeating a mortgage.
39. How tender must be made in proceedings to redeem.
40. Mortgagee's presumption of ownership from possession.
41. Mortgagor's presumption of payment from possession.
42. Effect of payment by a volunteer.
43. Payment by a surety.
44. How payment may be proved.
45. Usually mortgagee gives deed of release.
46. On mortgagor's death his heirs may call on his administrator to pay.
47. When the heirs cannot do this.
48. Rights to purchase of holder of equity of redemption.
49. Courts will not thus apply estate of insolvent mortgagor.
50. Payment of joint debt by one. His right to contribution.
51. Rights of assignee of one of several parcels to contribution.
52. Liability of mortgagor of several parcels, who afterward sells one, to pay entire debt.
53. Rights of different creditors in the same property.
54. Mortgagor's rights to charge for personal service.
55. Accounting in action to redeem.
56. Action of foreclosure.
57. Effect of decree.
58. Mortgagee may assign mortgage.
59. Assignment must be in writing and recorded.

60. Mortgagor can assign. Rights and liabilities of respective assignees.
61. Rights of assignees of several debts secured by same mortgage.
62. After mortgagee's assignment he can release nothing.
63. Law of place of assignment governs.
64. Assignment of mortgage without the debt.

1. Another form of limited ownership is by mortgage. This is a lien on land to secure the performance of some obligation, usually the payment of money. After this has been performed the mortgagee's interest in the land ceases, and the mortgagor or owner is reinvested with as perfect right thereto as though he had never made the agreement. Usually, the mortgagor remains in possession of the land until he fails to execute his agreement. When this happens the right and the title of the mortgagee to the land become perfected either immediately or within a given period, as will be hereafter shown.

A conveyance intended, at the time of its execution, to be a security for the payment of money, is called a mortgage. Washburn says: "Whenever there is, in fact, an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage, whatever may be the form adopted, or whatever may have been the understanding between the parties."[1]

2. A person need not be an absolute owner of land

[1] 2 Real Property, § 980, p. 34.

to make a valid mortgage. An owner for life, or for a shorter period, can mortgage his interest therein. An owner or tenant of land may mortgage the crops of fruit, or the fixtures that are to be attached to the land in the future. One in possession by virtue of a contract to purchase may mortgage the same.[1]

3. In a mortgage it is usual to express the full terms of the agreement. Yet this need not be done. The defeasance, as it is called, or terms for repaying the money, and closing the entire transaction, may be in a separate instrument. Usually the entire contract is put in a single deed or conveyance, which is recorded. In some states — New York for example — two instruments are given — a bond and a mortgage. This is a very elaborate mode of expressing the obligation; a simpler form is generally employed.

4. A deed, though absolute on its face, if delivered for the sole purpose of creating a security for the repayment of money is, in truth, a mortgage; and this intention may be shown by oral evidence. This is the general rule.

5. The question, perhaps, is still open whether a mortgage can be made for future advances or liabilities. The rule may be thus stated: A mortgagee who has agreed to furnish advances under all circumstances, and who would be liable if not fulfilling his agreement, takes precedence of another mortgage, made after the execution of the first, for the amount advanced both before and after the execution of the latter.[2] Again,

[1] Mortgages are made also on the security of personal property; these will be considered in another chapter.

[2] See § 1ab.

a mortgagee who makes voluntary advances after another mortgage, his refusal to make them not constituting a breach of his agreement, will have priority only for the amounts advanced before the execution of the second mortgage.

Lastly, a mortgage to secure future advances is not valid against subsequent encumbrancers who may make advances without any notice, except that given by the record, of advances actually made. In other words, a mortgage containing a stipulation of this kind is not regarded as a notice to a subsequent mortgagee except so far as the record discloses an actual advance; nor does the law require a subsequent mortgagee in good faith to make any inquiry concerning what action has been taken by the parties to a preceding instrument in the way of future advances.

6. After-acquired property, buildings, improvements, fixtures, become a part of the land and are acquired by the mortgagee. What are fixtures as between a mortgagor and a mortgagee is a question largely of intention, as in other relationships that have already been considered. Washburn says that the principle is very broad, including trade-fixtures attached to buildings by bolts and screws, although they may be removed without injury to the freehold. It also applies to whatever is added to a railroad under mortgage, and to all improvements made on mortgaged premises. Neither the mortgagor nor his grantee can claim an allowance for the same.

7. A levy may be made on the mortgagor's estate or interest in the land still remaining, and afterward it

may be sold to satisfy the claim of any other creditor.

8. A distinction exists between a mortgage and a right to purchase the land by the debtor. If the transaction is merely a right to repurchase, on the debtor's failure to comply strictly with the agreement all his right to the estate is gone. If the transaction is a mortgage then the mortgagor or debtor has an equity of redemption still inheriting in him to obtain the land. Whether the transaction is the one thing or the other is a question of intention that must be determined by the circumstances in every case. The courts are always inclined to regard the transaction as a mortgage.

Nor can oral evidence be interposed to show that a deed which appears to be a mortgage was intended as an absolute conveyance. While this rule prevails everywhere, the converse proposition is not true, that a deed, absolute on its face, cannot be changed by evidence showing that the parties intended to create a mortgage. Again and again has this been done. Among the facts that are of great weight in determining whether the transaction is a sale or not, with the right to repurchase, is the adequacy of the consideration. When this is a small sum for the property it is a strong circumstance in favour of regarding the transaction as a mortgage, for it is not reasonable to suppose that the vendor intended to part with his property at a grossly inadequate price, unless the reasons why he should do such a thing are clearly brought to light.

9. Secret agreements, not appearing on record, do not bind parties having no notice of them:

(*a*) As between the parties themselves and those who may know, they are often effective, but no principle of real estate law is better understood than this — that all arrangements, not open, are not binding on subsequent purchasers or parties who act in good faith. Thus, in most, if not all, states defeasances must be recorded, and, after this is done, the law at once assumes that everybody has notice of them; so long as the record discloses nothing, no such notice is presumed, and, therefore, a bona fide purchaser or a creditor who might attach the estate would not be affected by knowledge, afterward acquired, of the existence of a defeasance.[1]

(*b*) An agreement between parties, which, in fact, is a mortgage, cannot be changed in character by any other agreement made at the time between them relating to the redemption or other matter pertaining to the transaction. "The right of redemption," says Washburn, "attaches as an inseparable intent created by law and cannot be waived by agreement." The universal rule, therefore, is, "if once a mortgage always a mortgage." The law will not permit, for the sake of public policy, a mortgagor to embarrass or defeat his right to redeem the estate by any agreement which he may have made in order to effect the loan.

Indeed, the courts are so careful to guard the rights of mortgagors to redeem that they will relieve against any agreement limiting the redemption to a fixed time, or restriction to a specified class of persons, or giving to the mortgagee, after the mortgagor's default, a

[1] See 2 Washburn, § 997, p. 52.

right to purchase the estate at a particular sum. These limitations show the intent of the courts to guard, in every possible way, the rights of the mortgagor, and thus prevent him from parting with his property beyond all hope of recovery.

(*c*) This rule does not preclude a subsequent bona fide agreement concerning the disposition of the estate between the parties. A mortgagee may always purchase the mortgagor's right of redemption, and, in this way, acquire an absolute title to the land. The courts will carefully scan the transaction, but if the contract was fair and adequate it will be sustained.

10. Two creditors who obtain simultaneous liens on the debtor's land become tenants in common because their equities are equal, or rather because no discrimination can be made between them. But, if a debtor should make two mortgages simultaneously, one to his vendor to secure the purchase money, and the other to a third person to secure an independent debt, the vendor's mortgage would take precedence over the other.

11. A mortgage may be made with a power of sale in the mortgage, whereby, on the non-payment of the debt at the time prescribed, a valid and absolute estate may be conveyed to the purchaser. In executing a power of sale the mortgagee is the trustee of the debtor. Of course, he must act honestly and proceed in a way that will best serve the interests of the mortgagor. The parties may establish the terms of the sale, and, in all cases, the power must be strictly pursued, or the sale will be invalid. Moreover, the power passes

with the estate by agreement and is not affected by the mortgagor's bankruptcy or death.

A mortgagee, with such a power who conveys his whole estate passes the power also. But, if he convey only a part of the estate, as the power, from its very nature, cannot be divided, he can still exercise it, though not in a manner to interfere with what he has sold. After making a sale of the estate under the power, should there be a surplus, the mortgagee is a trustee for the mortgagor. If the mortgagor is dead at the time of making the sale his heir, and not his executor, can claim the surplus. In the way of a further application of this principle, a purchaser of the mortgagor's equity of redemption would be entitled to the surplus.

12. A mortgagee cannot purchase at his own sale and thereby extinguish the equity of redemption, even though the sale be public. This rule may be set aside by statute or by the terms of the mortgage. Whenever the sale is fraudulent it can be set aside. The utmost good faith is required on the part of the trustee.

13. A different rule applies to a sale made in good faith by an officer of the law. At this the mortgagee can be the purchaser, though some courts contend that the sale may be avoided, as the officer in making the sale is really acting in the capacity of agent for the trustee.

In some states there are statutory regulations concerning such sales; where these exist they must be executed, in letter and spirit.

14. Sometimes deeds of trust in the nature of mort-

gages are executed. In these a third person is brought into the transaction as an executor.

(*a*) The terms of the trust usually are, that the trustee shall reconvey to the grantor if he executes his part of the agreement, or, after failure to do this, shall sell the estate and apply the proceeds in satisfaction of the debt. The deeds are usually made by large corporations that wish to raise means on their properties, and are likened to mortgages rather than regarded as real ones.

In the deed the trustee may be authorised to sell the estate, or this power may be executed by another. The terms of the deed fix the rights of the several parties and prescribe how the property may be foreclosed and sold.

(*b*) A deed of trust may be made to secure future advances as well as present loans. Acting as agents of both parties, debtor and creditor, the conduct of the trustees, when requiring judicial examination, is carefully scrutinised. They cannot become purchasers of the estate, though the question whether the creditor in whose favour the trust has been created can become a purchaser or not has been answered in different ways.

15. In England a mortgage may be created by depositing title-deeds. This mode seems to be founded on reason because, in that country, until very recently, deeds were not recorded. The power to create this kind of a mortgage has been repudiated in many states in this country; and has been recognised only in a few of them.

18. A vendor may have a lien for the purchase money, and this lien is virtually a mortgage.

19. This right affects all purchasers even those who have no notice of the lien, and the vendor may, by virtue thereof, take the estate like a mortgagee. If, however, the vendor should mortgage the estate to a third person, who, ignorant of the lien, should put his deed on record, he would acquire a valid lien over the vendor supposing he has acted in good faith in making the mortgage. This kind of lien, though not prevailing everywhere, does prevail in a majority of the states.

20. It is founded on the theory that, until the purchase money is paid, the vendor holds the land as a trustee of the same for the purpose of securing it. Wherever this lien is recognized, no agreement is required to create it, and it is presumed to exist until the contrary is shown.

This lien is purely a matter of equity and is unknown to the common law. It prevails on the ground that otherwise the vendor would have no remedy, and that it seems he ought to have his purchase money secure in preference to others who may become liens affecting or property which is worth, until he has been paid therefor, really belongs to himself. Of course his lien may be defeated by any act showing his intention not to rely on the land for security. What such an act is cannot always be foretold. An express waiver would be effective, likewise the taking of collateral security, bond or note with the security of an endorser, or a deposit of stock.

21. A vendor's lien will prevail against an assign-

ment that is made for the benefit of creditors, provided the vendor enforces his lien before the assignee executes his trust. But when land is attached by virtue of a levy of execution issued on a judgment against the vendee, the lien will not prevail.

(*d*) With respect to the notice of a vendor's lien, it is said that any notice, sufficient to put any reasonable man on his inquiry, will suffice.

What is a sufficient notice to charge a second purchaser with knowledge of the vendor's lien is an open question. If the original vendor remains in open possession, especially if the purchaser learns of an agreement relating to the land, this will suffice — in short, any notice that would put a reasonable man on inquiry. Thus, a purchaser who knows that a part of the purchase money is unpaid, is in law notified of the lien. Again, notice to an agent of the purchaser or to his solicitor is a notice to the party himself.[1]

(*e*) A vendee who has paid any part of the purchase money for land before the delivery of the deed to him, has a lien for the amount advanced. It has all the characteristics of a vendor's lien, and may be enforced in the same manner.

(*f*) This lien does not arise in favour of a third party who pays the purchase money to the vendor for the purchaser and takes his note for the amount.

(*g*) The assignment of a debt secured by an express lien on property by agreement between the parties will give the assignee the benefit of the lien also. Therefore, the assignment of the vendor's claim for

[1] 2 Washburn, § 1029, p. 81.

the purchase money carries therewith his lien, whether express or implied. This rule does not prevail in every state. In some of them the lien is personal, and does not pass by an assignment of the claim.

(*h*) The lien may be enforced by a court of equity by ordering the sale of enough land to satisfy the lien. This cannot be done by a collateral proceeding, but only by a suit brought for the purpose.

17. A mortgagor having an equity of redemption may mortgage this by successive deeds which will take precedence in their order of execution. Indeed, he can make any number of subsequent mortgages, one after the other, as if none had been made on his estate. Of course the interest acquired by each subsequent mortgagee is subject to the interests of those who preceded.

18. There can be no mortgage without a debt. This must be sufficiently described so that it can be recognised and distinguished from other obligations. It must involve a personal obligation which is independent of the mortgage.

19. Two different legal theories are held concerning the operation or nature of a mortgage, and these must now be explained.

(*a*) One theory is that the mortgagee thereby acquires the estate which formerly belonged to the mortgagor who can reacquire it by paying the loan. Furthermore, the mortgagee retains his ownership until the mortgagor fulfils his agreement. The actual estate is in the mortgagee, the mortgagor is simply a reversioner having a right to repossess himself by performing the prescribed condition.

(*b*) By the other theory the mortgagor is the owner of the land and remains so until he fails to fulfil the agreement on his part, after which the mortgagee becomes the owner. This is known as the "lien theory," and is rapidly growing into judicial favour. Thus, in a recent case in Kentucky the Court of Appeals remarked: "The law is well settled that a mortgage is a mere security, and, both at law and in equity, the mortgagor is the real owner of the property mortgaged; and a mortgagee has no lien upon the rents and property unless he has, in the mortgage, stipulated for a specific pledge of them as part of his security; nor is he entitled to the insurance which may be collected by the mortgagor upon the buildings upon the property, unless the mortgage expressly stipulated that it shall be for his benefit."[1]

20. Any change in the form of indebtedness for which a mortgage is made will not affect the debt. Its existence will remain just the same. Nothing short of actual payment, satisfaction, or release will discharge it. The giving of a new note, therefore, for the original one, with a different date and amount unless intended as payment, will not affect the lien.

21. Both mortgagor and mortgagee may insure the premises. The latter can only insure for the amount of his debt. In taking out a policy in his own name and paying the premium, he takes the insurance money, in the event of a loss by fire, free from any right of the mortgagor to have it applied for the liquidation

[1] Gill v. Corinth Deposit Bank, 68 S. E. Rep., 870, 871.

of the mortgage debt. He can, if he pleases, require the insurance to be paid, and then proceed to collect the debt. But, if he insures at the request of the mortgagor, or in consequence of his neglect and at his expense, the mortgagor will be subrogated to the benefit of the insurance, and the money must be applied to the debt.

22. As between a mortgagor and a mortgagee, the latter has his remedy against the former for any misuse of the estate. He may sue him as a trespasser, or in an action of waste for improvident or unreasonable use. In like manner the law holds the mortgagee to a like account, when he is in possession of the premises, for using them in any way inconsistent with the legitimate purposes of the security.

In much the same manner as a tenant for life can be enjoined from misusing his estate, as previously described, the mortgagee may enjoin the mortgagor from committing waste. If the mortgagor leases the premises subject to the mortgage, and the tenant is recognised by the mortgagee, he becomes the latter's tenant, and cannot be treated as a trespasser.

23. A mortgagee who purchases the equity of redemption acquires the entire interest, and becomes the sole owner; the estates of both mortgagor and mortgagee are merged into one.[1]

24. A mortgage is often made to several persons, sometimes to secure two separate debts, sometimes

[1] "This is not necessarily so, but, on the contrary, when it is not the intention of the parties that it shall merge, or when it is not to the interest of the mortgage that such merger should take place, the mortgage continues to subsist." See note, 99 Am. St. Rep., 162.

to secure one or more joint debts due to the mortgagees. If the mortgage is made to secure separate debts the interests of the mortgagees are several and not joint, but the amount is measured pro rata by the respective amounts of the other debts. If the debt be joint the mortgagees are joint tenants of the mortgaged estate, and a release by one of the mortgagees would discharge the mortgage. As soon as the mortgage has been foreclosed and the legal estate made absolute, it is converted into a tenancy in common between the owners. If one of two joint mortgagees dies before the mortgage is foreclosed the survivor may bring an action for that purpose.

25. Two owners of distinct parcels who mortgage them to secure a joint debt charge both parcels equally for a moiety of the debt.

26. Successive mortgages duly registered take effect in favour of the successive holders in the order of registration. This is simply an application of the general rule that registration is a constructive notice to all persons having knowledge of it. But when two mortgages connected in the same contract are made to two parties, respectively, neither gains any precedence over the other by recording his deed first; their equities are still equal.

In many states a judgment takes precedence of an unrecorded mortgage.

27. How far a devise of land will pass a mortgage thereon is an unsettled question. The more general rule is, in devising one's real estate, mortgages are included in this term. On the other hand, a devise

of money securities includes a note secured by a mortgage. A testator, who after making his will devising his land, forecloses a mortgage existing at the time of making his will, transfers it as real estate.

28. On the death of a mortgagee his interest in the estate mortgaged descends to his heirs. This is the rule at law, but in equity both mortgaged interest and debt go to the executor or administrator, and the heir cannot release the mortgage. On one occasion the heirs of a mortgagee conveyed the premises before the mortgage was foreclosed. This was held not to operate as an assignment of the mortgage. An executor or administrator may assign one. This authority is given him by statutes in most of the states, and therefore the executor or administrator of a mortgagee may recover possession of the land thus secured, and must account for the same as personal assets.

29. In some states, on taking land for eminent domain, the mortgagor may claim damages; likewise for flowing his land with water in states where this right is given to mill-owners. Again, in laying out a highway or in repairing a street the mortgagor, if in possession, is deemed the owner and proceedings must be conducted accordingly. The taxes are a lien which are assessed on the mortgagor if he is in possession.

30. In some policies of insurance there is a clause stating that the sale of the estate by the insured will avoid the policy. But, in some states, a mortgage of land is not such an alienation as will avoid the policy.

31. A mortgagor cannot be charged with the rent before the mortgagee has obtained actual possession, even though the land is an inadequate security for the debt. The same rule applies to rent accruing after the beginning of a process for obtaining possession.

32. A mortgagee, by accepting a deed from his mortgagor, cannot deny his title; but a mortgagee may purchase an outstanding prior title, and hold thereby as paramount to his mortgage title. A mortgage is not negotiable, and, consequently, an assignee takes it subject to the equities existing between the original parties. Where the lien theory prevails the bona fide endorsee of a negotiable note secured by a mortgage is entitled to enforce the security notwithstanding the equities existing between the original parties. But this rule does not apply unless the assignee is entitled to the privileges of a bona fide endorsee against the maker.

33. Any person interested in a mortgaged estate has the right to redeem it — the various mortgagees, heirs, devisees, creditors, and other parties. The owner of an interest, however small, has an equal right with others to redeem and thus save his own interest.

34. The entire debt must be paid to work a redemption of the mortgaged estate. Nothing short of this will release the mortgagee's interest. But an offer of payment made at the proper time is effectual to bar a foreclosure of the land.

35. A sale of land on the foreclosure of a mortgage extinguishes the lien thereon, whether the entire debt

thus secured is satisfied or not.[1] Of course, the mortgagee still has a valid claim against the mortgagor for the unsatisfied balance. Therefore, as the mortgagee's lien is discharged by a sale of the property, a judgment creditor or other interested person who should offer to pay the mortgagee all that he has paid for the property at the sale, with the interest, if any has since accrued, may become the owner of the property without paying the unpaid balance of the mortgagor's indebtedness.[2]

36. A mortgagor who redeems regains his estate as fully as if no mortgage had ever been made. Therefore no lease, charge or encumbrance made by the mortgagee during his qualified ownership can be set up against the mortgagor.

37. One of several persons who redeems a mortgaged estate by paying the whole debt becomes and remains an equitable assignee of the mortgage, until the respective parties interested therein contribute their due proportions.[3] But if two tenants in common join in mortgaging the common property to secure the debt of one of them, and the other then conveys his share to the mortgagee, the one whose debt was secured must pay the whole debt to redeem his share of the estate and thereby relieve the other share.

38. One who purchases or acquires by assignment an estate subject to a mortgage, or a right in equity to redeem an existing mortgage, cannot set up usury in the mortgage to defeat or diminish the claim of the

[1] First National Bank v. Elliott, 125 Ala., 646.
[2] Same case.
[3] See § 50.

mortgagee. In like manner one who purchases an equity of redemption at a sheriff's sale cannot deny the validity of the mortgage itself. But one who purchases a mortgaged estate, or takes a second mortgage thereon, may take advantage of any defect in the mortgage in the same manner as the mortgagor himself could do.

39. In legal proceedings to redeem tender of the amount due must be made. But if the mortgagee has done nothing to prevent the mortgagor from performing his part of the agreement, he will be entitled to costs.

40. A mortgagor may be barred of his rights to redeem when the mortgagee has been in possession of the land adversely for the requisite period. The law presumes by such a long possession that the equity has been extinguished. But no length of possession by the mortgagee will bar the mortgagor's right to redeem, if the mortgage has been treated throughout the period as a security for the debt. In other words, to make the mortgagee's action effective to extinguish the rights of the mortgagor, he must act in a manner openly adverse to the other's rights.

41. On the other hand, the law will presume payment of the mortgage from long-continued possession by the mortgagor without paying rent or interest, or admitting the existence of the debt. When payment is thus presumed from lapse of time, of course the mortgagee cannot bring a bill for the foreclosure of the land.

The tender must be made by someone who is entitled to redeem. Anyone who has an interest in the mortgaged premises has this right. Among these may be

enumerated the grantees, subsequent mortgagees, judgment creditors, heirs, devisees, and the like.

A tender, thus made by a person having the right to redeem at the maturity of the debt, works a complete discharge of the mortgage, and the mortgagee no longer has any right or interest therein. Furthermore, if the mortgagee should be in possession, an action of ejectment would lie against him just as against any other wrong-doer, to turn him out of the premises.

42. Payment of the debt by a volunteer — that is, a stranger who is not interested in the mortgaged premises — will not extinguish the mortgage unless an assignment is actually made to him. Nor can he claim an equitable assignment, even though he has paid the debt. Again, payment by one who is not under a prior obligation to pay, but is secondarily liable as a surety or as an endorser, does not always operate as a discharge of the debt, but the payee may, by thus paying, become, in equity, the mortgagee. In other words, if his interest requires that the mortgage should be kept alive after having paid it, a court of equity will regard the transaction as an assignment of the mortgage to him, and not as a discharge of it.

43. The payment of the debt by a surety operates as an assignment of the mortgage to him, and he can enforce it against the mortgagor or his heirs and assignees. He is, in truth, only secondarily liable. The mortgagor is the primary debtor and the land is a primary fund out of which the debt must be satisfied.

44. Payment of a mortgage may always be proved orally or by any facts which clearly evince a payment

or discharge of the obligation. Possession of the note by the mortgagor is not always absolute evidence that the debt has been paid when this can be satisfactorily explained. Without explanation the mortgagor's possession creates a strong presumption that it has been paid.

45. Usually, on payment of the mortgage, the mortgagee gives a deed of release or formal discharge, which is put on record, thus showing that the encumbrance no longer exists. Ofttimes this is omitted, or the release given to the happy mortgagor, he has forgotten to have recorded; and so the cloud remains on the title, to the great vexation, it may be, of someone at a later period, who may wish to sell or purchase the property.

46. On the death of a mortgagor his heirs may call on the executor or administrator to pay the mortgage out of the personal estate, for the reason that it was primarily given for the benefit of the personal estate of the deceased. In like manner a devisee can call on the executor or administrator to pay the mortgage, and thus relieve the real estate of the encumbrance. This principle extends no further, and legatees, both general and specific, as well as creditors, can make no such demand on the executor or administrator.

47. But an heir who sells an equity of redemption that descends to him, without exercising his right to have the mortgage paid out of the personal estate, cannot afterward call on the executor or administrator to discharge the mortgage. This rule is of general application.

48. In like manner the holder of an equity of redemption who has acquired it by purchase has no right in equity to call on any other fund for the relief of his own estate.

49. The courts will not apply the personal property of an insolvent estate to discharge a mortgage. Nor can the personal assets existing in one state be used to relieve the real estate in another state of any encumbrance existing thereon.

50. One of two persons, jointly liable for a debt, who pays the whole has a right to call on the other for contribution in proportion to their several interests. And a person entitled to redeem, though interested only in a part of the land, if he pays the entire debt, as against others jointly interested with him, gains the place of the mortgagee. In law he is said to be subrogated to his place; in other words, acquires all of his rights. Consequently, he can foreclose the mortgage against them if they refuse to pay their pro rata share of the debt. This is not a personal liability, and, consequently, they can refuse to pay upon surrendering their interests in the land to the mortgagee, or to one who has paid.

51. Again one of two or more parcels of land, simultaneously conveyed by a mortgagor to different persons, may be sold under a foreclosure. In such a case the assignee or grantee of that parcel has a right to recover from the assignees of the other parcels their pro rata share of the debt. The debt is a liability among them in proportion to the value of their respective parcels.

When the assignments have been made successively or at different times, the courts have had great difficulty in establishing a rule to govern parties in such relations. Perhaps the best rule is to regard the liability of the respective parties as accruing in the reverse order of assigning the property. In other words, the first assignee is the last one to be held liable, and the last assignee is the first one to be held liable for the payment of the mortgage. By this rule, therefore, he is held for the entire amount. Should he be unable to pay all, the next preceding assignee would be liable, and so on until the first was reached.

52. A mortgagor, who, after executing his deed, conveys parcels of the mortgaged property to persons at different times by warranty deeds that contain no reference to the mortgage, is primarily liable on the land he retains for the entire mortgage debt. This, therefore, must be first sold to satisfy it, and, if insufficient, then the mortgagee must resort to the parcels conveyed and sell them in the inverse order of purchase.

53. Another principle applies in the case of two or more parties interested in the same mortgaged property. Suppose a creditor holds two mortgages on two different estates to secure one debt, and a creditor of the same debtor has a later mortgage to secure his debt on one of the parcels. Equity requires the first mortgagee to exhaust the security he has in the parcel not covered by the second mortgage before proceeding against the latter parcel. In like manner a mortgagee who holds collateral security in addition to a mort-

gage must first exhaust his mortgage security before calling on the surety. So, also, a senior mortgagee must exhaust so much of the mortgaged property that does not secure a junior mortgagee before resorting to the property on which the junior mortgagee relies.

54. With respect to a mortgagee's right to charge for personal services in taking charge of an estate, collecting the rents, etc., the general rule is that this cannot be done except when it is necessary to employ a bailiff or agent to do the business. If he occupies the premises himself he cannot charge a commission for his services.

55. In an action to redeem, the mortgagor may call for an accounting by the mortgagee. This will be ordered whenever the mortgage debt involves a long account of charges. Such an accounting is especially necessary when the mortgagee has been in possession of the land, and has received the rents and profits, and has expended money in keeping the premises in repair. The case is, then, referred to a Master in Chancery, who determines the whole matter.

In conducting this accounting the two leading questions are, what are lawful debits and lawful credits? The mortgagee will be charged with whatever rents he may or ought to have received in managing the estate. He will also be charged with all damages done to the premises by himself or by others with his authority or permission. Thus, he is liable in damages for opening a mine or for letting the premises fall into decay. On the other hand, he is entitled to credits for all proper

expenses incurred in maintaining the buildings. An author says that the true rule seems to be that he would be allowed only such expenses as he incurred in making repairs that were necessary to keep the premises in the same condition as that in which he received them; and for such improvements beyond that limit that were necessary to the ordinary and reasonable enjoyment of the premises. In some states he has been entitled to the cost of lasting and permanent improvements of a truly beneficial character.

56. To bar the mortgagor's equity of redemption and acquire the absolute title to the property, the mortgagee must bring an action for foreclosure. There are two kinds of species of this remedy. The first is called a strict foreclosure. By this a decree is rendered barring the mortgagor's equity and vesting the absolute estate in the mortgagee if the debt be not paid within a certain time after rendering the decree. The other is called an equitable foreclosure, and is the remedy in most general use. When this is granted the court renders a decree ordering the property to be sold and the proceeds to be applied in liquidating the debt. If any surplus remains, this is paid over to the mortgagor. The bill to foreclose may be filed at any time after the mortgagor's failure to comply with the agreement to pay his obligation; in other words, after his failure to pay his debt or debts as he has promised to do.

All persons interested in the determination of the suit should be made parties. This includes all subsequent purchasers, other mortgagees, persons holding

judgments, judgment creditors, and the like. There is a question, sometimes, concerning the mode of ranging them on one side or on the other of the action. Those who are not made parties in bringing of the proceedings should be summoned as parties to defend them.

It is needful to summon all parties for the reason that, should any be omitted, they would not be affected by the decree rendered by the court. In strict foreclosure the decree makes the estate absolute in the mortgagee. The legal estate descends to his heirs instead of to his personal representatives.

57. The effect of a decree on a minor is to bind him unless, within a period of six months after arriving at majority, he can show some error in the foreclosure. If this is by a sale of the land the minor cannot disturb the title acquired under the decree. Judgment in such cases is binding for the reason that the chancery courts have jurisdiction over minors, and are supposed to adopt sufficient precautions to protect their interests.

In a suit for strict foreclosure there can be no action on the surplus of the debt remaining unsatisfied. A mortgagee who wishes to collect the unsatisfied balance must open the foreclosure, and have the property sold under judicial decree, and enter the amount of the judgment against the debtor.

In the ordinary cases of foreclosure, as we have stated, the proceeds of the sale are applied to the liquidation of the debt, and, if these are not sufficient, the mortgagee has a remedy in an original action at law to recover the balance. It will thus be seen that

the debt is not extinguished by taking the land. This is simply a security, and the debtor is still liable, if enough cannot be obtained to extinguish the debt.

If there be more than one mortgage, and if a surplus remains, after paying the expenses and the first mortgage debt, the balance goes to the junior mortgage; if there be several, then to them in the order of the priority of their claims. Should there be a surplus after paying all the mortgages, the balance belongs to the mortgagor, or, if he be dead, to his estate.

58. A mortgagee may assign his rights; his assignment should be prepared in a manner as formal as the original deed of mortgage. This should be recorded also in the same manner, to give all parties notice of the transaction. This is the proper manner of making an assignment. Thousands of cases have arisen in consequence of the neglect of parties to fulfil this simple and proper requirement.

59. Sometimes an assignment is written on the back of a mortgage itself, and is delivered, with the mortgaged deed. This transfers absolutely the interest of the assignor, but the potency of the transfer, with respect to other parties, depends on the notice they receive of the transaction.

60. The mortgagor also may sell or assign his remaining interest. The assignees enjoy all the rights and assume all the liabilities of their respective assignors. If the mortgagee is entitled to possession so is his assignee, who may also appropriate the rents and profits, as the mortgagee could have done had he

remained in possession. The assignee of the mortgagor, on the other hand, has a right to redeem the estate, and call upon the mortgagee to account for the rents and profits received by him, as if he had been in possession.

61. The assignees of several debts, secured by the same mortgage, that have been successively assigned, will share the benefit of the security pro rata. If the debts secured by the same mortgage are payable at different times, they are to be paid from the mortgage fund in the order in which they are due. The holder or owner of a mortgage made to secure several debts may assign one or more of them in such a manner as to give the assignee a preference over other debts. In applying this principle some difficulty has arisen when the same mortgage deed secures several different debts which have been transferred by the owners to different individuals without assigning the mortgage. In some states the mortgage is regarded as a separate mortgage for each debt, and an assignment of one of them carries therewith its proportion of the mortgage interest; and, in the distribution of the proceeds springing from the sale of the land, they are paid to the several holders in the order in which their debts became due.

62. After a mortgagee has assigned the mortgage he can discharge no part of the premises from the mortgage by a release. While he holds it he is not obliged to enforce the mortgage pro rata on the several parcels, though belonging to several different persons. He can elect to enforce it on all or any number of them, and any oral agreement at the time of making the mortgage,

embracing several parcels, to discharge any one of them on the payment of a certain sum, is inoperative. Nor can a mortgagee, by releasing several parcels, throw more than a pro rata share of the mortgage debt on the other parcel or parcels.

63. In assigning a debt secured by a mortgage the law of the place where the agreement is made will govern. When the transaction is regarded as a transfer of real estate, then the law of the place where the land is situated must be applied.

64. Where the mortgage and debt are inseparable, and they are so regarded in many states, an assignment of the mortgage without the debt would be void, and a person occupying under such an assignment would be a trespasser. Where the mortgage and debt are separable, the debt can be assigned without changing the record. In all cases the safest mode of procedure is to make a formal assignment in writing, like a deed, and record it.

When an assignment has been made in a less formal manner the above question has arisen between subsequent parties, attaching creditors, and the like, and the original mortgagor and mortgagee. As no uniformity exists in the decisions of the courts on this long series of questions, we shall not attempt to deduce any rules from them.

§ 11. Easements. Rights of Way, Light, Water, Etc.

1. Easement defined.

2. How created.
3. How classified.
4. How acquired.
5. Sale of dominant estate.
6. Easement cannot be increased.
7. Selection of way from necessity.
8. Effect, on easement, of dividing dominant estate.
9. Acquisition of right of way by prescription.
10. Prescription does not run against a minor.
11. Tenant cannot acquire a right against his land lord.
12. How time is computed.
13. Prescription need not be exclusive.
14. Acquisition of a prescriptive right by the public.
15. Owner must confine himself strictly to the use of his right.
16. Owner of dominant estate must repair ease ment.
17. Right of way cannot be obtained orally.
18. What acts will work an abandonment of it.
19. Acquisition of easement of light and air.
20. How acquired.
21. Cannot be easily gained.
22. Right to enjoy a prospect.
23. Encroachment.
24. Easement in water.
25. Diversion.
26. Quality cannot be injured.
27. Surface water. Right of upper owner.
28. Right of lower owner.
29. Draining a swamp, well, etc.

30. Priority of use.
31. Underground springs.
32. Right to cut ice.
33. Lateral support.
34. Party wall.
35. Right to lateral support of highway.
36. Right of mine-owner.
37. Right to maintain an offensive trade.
38. Right to fishery.
39. Rights in division fence.
40. Rights in a wharf.
41. Landing-place.
42. Right to take gravel, etc., from land of another.
43. How easements may be lost or destroyed.
44. What are acts of abandonment.

1. An easement is the right of a land-owner to use the land of another for a special purpose. The owner who has this right is called the dominant owner; the other, whose land is thus used, the servient owner. These rights may relate to the use of a way, water, light, and air, support of the soil or buildings, party walls, etc.

2. To create an easement two estates must exist belonging to different persons, for no man can have an easement in his own land. Consequently, by becoming owner of both estates an easement is extinguished. In other words, "the exercise of the right which, in other cases, would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary

or determine at pleasure. The inferior right of easement is merged in the higher title of ownership." [1]

3. Easements are divided also into affirmative and negative ones. The former permit something to be done on the land of another; for example, to pass over it, or to discharge water thereon. A negative easement consists in prohibiting one from doing something which would otherwise be lawful for him to do; for example, interrupting light and air from a building, or diverting a natural watercourse whereby the water is prevented from flowing to an ancient mill.

4. Easements may be acquired in three ways: by express grant; by implied grant; by prescription. Many easements are acquired in the former manner by a deed or writing. When thus created the deed itself defines the nature of the easement. Many also are implied. Thus, A sells to B land enclosed or surrounded on all sides by other lands belonging to A. As there is no way for B to reach his land except over A's, the law implies that, at the time of the sale, A intended to give the purchaser a right of way somewhere over the land still retained by himself. In like manner, should A sell a piece of land, reserving a portion in the centre, the law would imply the right on his part to travel over the land thus conveyed to another, in order to reach his own. Thus, it will be seen that the rule works in both directions to create ways of necesssity, and the same principle applies in other cases. By prescriptive easement is meant the acquiring of a right by such use of a particular thing

[1] Kieffer v. Imhoff, 26 Pa., 442.

for a prescribed period as to create legally a title or right to its use. Thus, suppose A should walk over the land of B in a particular path for twenty years, claiming during that period the right to go there, he would, at the end of that period, acquire by prescription or adverse user, in legal phrase, the right to continue to go in this manner indefinitely; indeed, as perfect right may be acquired by going in this way for a period fixed by law, openly and adversely, as can be acquired by a written deed.

5. The sale of the dominant estate includes the easements belonging thereto, even though they are not necessary to the enjoyment of the estate by the grantee.[1]

6. An easement cannot be increased beyond its original character.[2] Thus, should A sell to B a field for ordinary cultivation with a right of way thereto from the highway, he would have no right to divide the field into house-lots, build up a village, and subject this right of way to a larger use than originally intended. But a footpath acquired by prescription, by the members of one family residing on the dominant estate, may be used by other families residing on the same estate.[3]

7. The choice of the location of a way selected from necessity falls on the owner of the servient estate, who must select a route with due regard to the convenience of the owner of the dominant estate. Should the

[1] See § 15.
[2] 2 Washburn, § 1234, p. 278.
[3] Baldwin v. Boston & Maine R. R., 63 N. E. Rep. (Mass.), 428.

former fail or refuse to make the location, the owner of the dominant estate may do so, also having due regard to the other's reasonable convenience. When the way has been selected it cannot be changed by either party without the consent of the other. The same doctrine applies in locating an aqueduct or any other easement. In applying this rule to trees, should A sell his land to B, reserving the trees growing thereon, he thereby reserves a right to enter on the land and to cut and carry them away. On the other hand, should he sell the trees, the right to enter and carry them away would likewise pass with the grant. Again, in applying this rule to mines, should one sell land and reserve the mines therein, this would include the right to pass over the land sold and do whatever would be necessary for carrying into effect the privilege or right retained.

8. Sometimes a dominant estate to which an easement is attached is divided, and the question then arises concerning the future of the easement. The owner or assignee of any part may claim a right to the easement so far as it may be needful to the enjoyment of his property, provided the burden or charge of the easement on the servient estate is not increased. In one case a person sold a piece of land opening on another lot, which the grantee guaranteed should remain open for purposes of light, etc. The grantee sold a part of his estate to C, and then the original grantor, having sold the open lot to D, the latter began to build thereon. On the application of C, the court restrained D from continuing his purpose.

9. It is often difficult, with respect to prescriptive

estates, to determine whether the right has been fully acquired. Originally, the time for gaining the right was a date anterior to the memory of man. At one time in the history of English law this was fixed at the beginning of the reign of Richard I. Instead of an indefinite period, the courts in this country began to fix on a definite time of twenty years, in analogy to the statute of limitations concerning the entry into land. In many states this period is limited to fifteen years or twenty years. The use, to ripen into a prescriptive title, must be uninterrupted and having the actual or implied acquiescence of the owner under an adverse claim of the right, since no length of enjoyment by the land-owner's permission will ripen into an easement. The inference of a grant, if perfected at all, is derived from a claim of right on one side and yielding on the other. In one case two adjacent owners built a party wall between their estates, resting it upon an arch, the respective legs of which stood on the lands of the different owners. The archway was used by them as a common passageway, and this was held by the court to be such an adverse user as to give to each a prescriptive right to have the wall thus supported. It is no objection to the acquisition of an easement in this manner that it began by permission, if the adverse claim is subsequently set up and maintained during the requisite period as a right.

Hundreds of cases have been tried involving the question, what kind of use is adverse. In one of them a person turned his cattle on land between which and a beach there was no fence. The cattle constantly,

wandered on the beach to look at the sea and to pick up crabs, and the farmer finally claimed that by thus wandering on the beach they had acquired a title thereto for him. The court decided otherwise. One test often applied is whether such a use is injurious to another or not. If it is not, it is said that it will not create a right by prescription. The test is not always correct. Again, permissiom to use the land of another negatives the idea of prescription, though, as we have said, a person may, in fact, after occupying land permissively, lay claim thereto as a matter of right. Again, it is said that the owner must know of such a user in order to render it effective. But acquiescence presupposes knowledge. Nevertheless, it is maintained that even a right of way cannot be acquired by prescription without the acquiescence, actual or implied, by the owner. But the presumption of acquiescence arising from actual knowledge may be rebutted by a proof of legal proceedings and denial of the right.

10. It should be added that, for a use to be "adverse," it must be against someone who is capable of acting. Consequently, a user will not begin to run against a minor, nor an insane person, nor against anyone while possessing a legal disability to act for himself in defending his possessions.[1]

11. Again, one in temporary possession of an estate as a tenant cannot by a user acquire in the land of another any easement that will continue any longer than his own estate. Thus, if a person, occupying

[1] 2 Washburn, § 1255, p. 299. "But a disability arising after the use has become adverse, does not suspend the acquisition of the right or extend the time necessary to acquire it." Ibid.

under a lease of thirty years, should acquire an easement over the land of another by adverse user during the period fixed by law, the easement would come to an end on the cessation of his tenancy. In like manner a widow who might be enjoying her dower and also an easement connected therewith, would lose all right therein on the cessation of her dower estate.

12. In computing the time of enjoyment the user need not be by the same person during the entire period. Thus, if one who had enjoyed an easement, say for ten years, should die and his heirs should continue to use it for the remainder of the time required by law to complete his right, it would be gained.

13. In thus claiming an easement the prescription or use need not be exclusive. Other persons may, during the same period, have used or acquired the right. In other words, different persons may claim and acquire the same way or other right by different users.

14. So, too, they may be established by dedication, which is a method clearly distinguished from that above described. If the dedication be express there must be an appropriation of land by the owner to public use "by some express manifestation of his purpose to devote the land to the public use." If the dedication is implied, this results from "some act or course of conduct from which the law will imply such an intent." [1]

15. The law is strict in requiring the owner of an easement to confine himself to his express or implied

[1] Elliot on Roads, § 121, p. 133.

grant.[1] A person who has a way for one purpose and makes use of it for another becomes a trespasser, as clearly as if he had no easement at all. A footway, therefore, cannot be used as a horseway, nor a carriage-way for driving cattle thereon. In one of the cases B's right to use a way for carrying off the farming produce of his land gave him no right to carry lime from his land over the same way. The law is perhaps still more strict in the case of grants that are implied. It compels people to restrict the use of the easement to such purposes as are reasonably connected with the use of the land granted.

16. The owner of the dominant estate is bound to repair the way; though the owner of the servient estate may, by contract or prescription, be required to make the necessary repairs. And when the owner of the servient estate is thus required to repair the way, the other owner may pass over other land of the servient owner if he has not maintained the way in a proper manner. Such an additional use of the estate of the servient owner, however, is strictly limited by necessity.

17. As a right of way cannot be acquired by a mere parol agreement between the owners of the two estates, in like manner a right of way cannot be abandoned or surrendered orally. But an executed oral agreement to discontinue the use of a way has been regarded as sufficient evidence of a surrender.

18. What acts will operate as a surrender or aban-

[1] See § 6. Washburn on Easements, § 9, p. 135. Says Kerr: "A right of way acquired by prescription for a special use or purpose cannot be used for another and different purpose." 3 Real Property, § 2216, p. 2219.

donment must be determined in each case by itself, and this must be an act or acts done by the owner of the dominant estate, or with his consent, by the owner of the servient estate. Thus, one who had a right of way by a grant for a piece of land made an impassable fence across the same for seven years, and the easement was not extinguished. But the cases are not uniform on this subject. Many of them admit that a way may be abandoned by acts of a comparatively short duration. The test is the intention with which the acts are done.

19. Many of the rules we have given relating to the acquisition of ways apply also to easements of light and air. From their nature, the original acquisition of the right to their use must be in a different manner. Thus, an uninterrupted enjoyment of light and air over and across the land of another for twenty years or more is sufficient to acquire such enjoyment. Nevertheless, the enjoyment cannot be said to be adverse, for the very nature of light and air forbids or prevents such a user.

A land-owner has no right to complain of any use that may be made of adjoining or neighbouring land, unless he has acquired some right therein. A neighbouring owner may therefore use his land for any legal business whatever, or erect any structure thereon unsightly to the feelings of the adjacent owner, or injurious to the value of his property. "Likewise the owner of land cannot object that his building is deprived of light by an erection on adjacent land, that a view from his premises is cut off thereby, or that

the view of his shop windows or signs by the public is so cut off. Nor can he object that windows are placed in a neighbouring building so as to enable persons to look into his windows or yard, his only remedy being to construct a building or fence which will shut off the neighbour's view of his premises. It is entirely immaterial that one's motive in so using or improving his land as to annoy his neighbours is malicious, and for the sole purpose of injuring the latter, provided the act be otherwise lawful." [1]

The owner has a natural right to have the air diffused over his land in approximately its natural condition, free from pollution by smoke, dust or vapours, or by disagreeable odours. The violation of this right is a nuisance which entitles him to recover damages for the injury, or an injunction to prevent these things from happening. If a person sells a part of his land the law does not presume that he also sold the light and air on the portion unsold, thereby preventing him from making as complete sale of the remainder. In one of the late cases the court held that a grantor or purchaser of a part of a tract of land has no implied grant or right of light and air as against a subsequent bona fide purchaser of the remaining portion, unless his use of it is so evidently necessary to the reasonable enjoyment of the first purchase as to clearly indicate to the second purchaser that it was the intention of the parties to the first sale to create and continue such right, and to charge the second purchaser with knowledge that law and equity forbade him, if purchasing,

[1] Tiffany on Real Property, § 650.

from so occupying his part as to interfere with the right to the light and air of the other.[1]

20. A person does not acquire a right to light and air across another's land for the benefit of his house by simply erecting it on the border of his own land, while the adjoining land is unoccupied.[2] The reason is, by making windows in houses, the act is not an adverse use of another's property, for, in doing so, a person does not interfere in any way with the free enjoyment of the land by the adjacent land-owner. The adjoining owner may, therefore, at any time erect a house on his own land, thereby obstructing the light and air of another. Again, the owner of a house who has acquired the right of easement of light and air through a certain window, by closing it up and opening another of a different size and in a different place, loses his right altogether. In like manner, if he tears down an old house and builds a new one, his windows must be the same in size and position as those in the old house. It is said that the mere enlargement of a window would not destroy the easement if the other estate was not thereby more heavily burdened. Nor would a change in the uses of a room lighted by such a window make any difference. A person may be enjoined by an adjoining owner who suffers special injury in the way of light, air and access caused by the display of merchandise. The public also have some rights which should not be disregarded. "As a general rule, the public are entitled not only to a

[1] Robinson v. Clapp, 66 Conn., 365.
[2] This is the American rule.

free passage along the streets, but to a free passage over each and every portion of the street."[1]

21. In this country the rule is spreading that a prescriptive right to the enjoyment of light and air cannot be easily gained as an easement because it is incompatible with progressive changes, especially in the cities. But there is nothing to prevent the acquisition of light and air by an express grant or agreement.

22. The right to enjoy a prospect from one's estate as an easement cannot be acquired by any user, however long continued, nor will such a right, except a street view, pass by implication. Nor can a person maintain an action against another for erecting on his own land an obstruction to the former's view, unless the right has been acquired by express agreement.

23. An owner may also suffer from an encroachment. This may consist of a great variety of acts; a common one in cities is to insert beams and other structures beyond the dividing line. From such acts the owner may sometimes obtain relief by removing the encroachment. In so doing he must use great care to remove only the excess, and to cause no needless injury. Another way is to compel the encroacher to remove his encroachment. A court will not always order this to be done if the cost of removal be great and the encroachment be slight. When refusing, however, the encroacher is required to pay for his benefit.

When the wall of a building erected by a lessee gradually encroaches on an adjoining lot, forcing the wall outward and causing it to crack, the adjoining

[1] Lavery v. Hennigan, 52 N. Y., Super. Ct., 463, 467.

owner may recover against the lessee.[1] An owner may maintain an action for the erection of a bay-window which extends over his line by the adjoining owner, although that portion of his land covered by the bay-window has been used as a highway. Furthermore, evidence of a custom to erect bay-windows in this manner cannot be admitted for the purpose of defeating a recovery. It was said in a Boston case: "If it be a custom to erect them over the land of other people, such a custom is illegal, and the defendant cannot justify himself in occupying his neighbour's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston."[2]

An owner of land has the same duty to keep on his own land a house or wall built thereon as to keep the filth in his cess-pool, or the water in his reservoir, or the snow on his roof. His duty is to keep it in such a state that his neighbour may not be injured by its fall,[3] but there is no implied obligation between owners of distinct parts of a building which will enable one of them to maintain an action against the other for mere refusal and neglect to repair his tenement.[4]

24. The use of water may also be the subject of an easement.[5] The general rule is, any person through whose land a stream flows may use it. Therefore, a proprietor above cannot divert the stream or cut it off,

[1] Hoffenberth v. Myers, 42 N. Y., App. Div., 183.
[2] Codman v. Evans, 87 Mass., 308.
[3] Kappes v. Appel, 14 Ill., App., 170.
[4] Pierce v. Dyer, 109 Mass., 374.
[5] See next section.

or in any way seriously injure the rightful use of it by the owners below. But every person can make some use of the water while passing over or through his land, and, for the purpose of using it more effectively, can impound it for a reasonable period.[1] Many exceedingly important questions have grown out of the legal uses that may be made of it during its course. Thus, persons have a right to use the water for purposes of irrigation, or for watering their cattle, and yet there is clearly a limit to the use — even for these purposes — that anyone can make of it. If there were not a limit, perhaps a few, by making a too liberal use of the water, might exhaust the entire stream, leaving none for other riparian proprietors. To what use, therefore, is each individual limited? Such use as will not seriously affect the usual quantity. From this answer it will be seen that the question is an open one in each case. In some sections of our country this mode of obtaining moisture for lands is coming more and more into vogue; in these the question possesses the highest importance to the respective proprietors.

25. Should a riparian owner divert a stream, as

[1] In a well-considered case that was recently decided, the court said, in reply to the objection that a riparian proprietor has no right to make a lake and divert the water: "He unquestionably has the right to make such use of the water as belongs to one who owns the land through which such a stream runs. The general rule is that each of the riparian proprietors is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, and what is reasonable with respect to the rights of others must depend upon circumstances, such as the character and size of the stream and the use to which it can be applied. One of the common uses of a stream which is not navigable is to detain and obstruct its flow with dams, in order to utilise the water-power, and hence it cannot be said that building a lake in a stream is necessarily interfering with the rights of the others. Each case must largely depend upon its own peculiar facts, so far as the quantity that can be taken is concerned." West Arlington Improvement Co. v. Mount Hope Retreat, 91 Md., 191.

indeed he may on his own land, it would be his duty to turn the stream into its former bed before debouching from his land.

26. Formerly, a riparian proprietor could not seriously injure the quality of the water. A mill-owner had no right to put dyestuffs or the refuse of his mill into the water to the injury of the other owners below who might wish to use it as a supply for watering their cattle, or for house purposes. This rule, like many others, has been greatly modified by the changed industrial and social conditions of more modern society, as we shall shortly explain.

27. In treating of surface water some difficult questions also have arisen. Two men own adjoining lands on a hillside, one above, the other below. Several suppositions may be made. First, if the upper proprietor desires to conserve or use all the water, can he do so? Again, instead of suffering it to drain off naturally, he makes artificial ways whereby it flows into or upon the land of his neighbour in one or a few places. Again, he is angry at the lower proprietor, and, knowing that he is desirous of obtaining as much of the surface water as possible, spites him by digging a channel on the lower edge of his land through which the water runs into the street.

28. Let us look first at the lower proprietor. Can he prevent the natural flow of water by building an obstruction across the upper edge of his land whereby the water will accumulate until it finds an outlet in some other way than across his land? Or, to put the

principle in another way, has the lower proprietor any right to prevent surface water from flowing off across his land by virtue of its gravity?

To two of these questions answers may be given. The upper owner has an absolute right to erect such obstructions as will prevent his land from injury by diverting the water into the highway, perhaps, or into some other place, although the use of it may be valuable to the adjoining owner below. Again, the lower proprietor has the same rights as the one above him to make such an embankment as will prevent the water from entering his land. This is not the law everywhere; in some states he cannot prevent such a natural course of the water as from a highway to a lower field.

There is a just distinction between subjecting the lower land to the ordinary usual servitude, the ordinary flow of surface water, and surface water unusual in quantity and impaired in quality. But is it just to subject the lower owner to an unusual flow caused artificially, or to water that is impure by reason of human action, without giving him compensation? Ought not the rule that applies to the defiling of a natural stream be applied in such cases?

29. A man may drain his swamp, though by so doing he may prevent the water which formerly collected there from finding its way into the stream, and thus diminish its volume. Likewise, the owner of a well, that is accustomed to overflow, may prevent such action, though in doing so he prevents it from draining into a ditch extending to a mill stream. But

the owner of a spring that issues out of the ground, and flows in a natural channel into the land of another, cannot give a new direction to the stream, nor use the water on his own land to the other's injury. The character of surface water cannot be changed into a watercourse merely by collecting a considerable quantity.

30. A person may, by priority of use, acquire a right to the undisturbed enjoyment of water. Thus, should a person erect a mill and use the water for a period of twenty years in a certain manner, the other proprietors above and below him could not disturb his use of the stream in the future. But he cannot change the nature of his acquisition in any manner. If, for example, he had been in the habit of damming the water for a given length of time, this would not justify him in retaining the water for a longer period.

31. Though a watercourse cannot be diverted, except on the owner's own ground, this does not apply to water or springs running beneath. Consequently, in digging a well or tunnel, should the source or supply of another's well be struck and cut off, this would be a damage without redress. In one of the cases the court states the principle in this manner: "If a man digs a well in his own field and thereby drains his neighbour's well, he may do so unless he does it maliciously."[1] This principle, however, does not apply in places where the chief source of supply is percolating water obtained by artesian wells. In such places a land-owner has no right to sink wells on

[1] Acton v. Blundell, 12 Mees & Wels., 336.

his land and draw off the water supply of his neighbours, whereby their trees, vines, and other plants perish.[1]

32. The right to cut ice is a natural right incident to riparian ownership. The riparian proprietor has the same right in the ice as in the water, for this is simply water in another form, and the limitation, therefore, is the same — that he must not cut enough to appreciably diminish the flow of the stream to the injury of the lower proprietors.[2]

33. Another easement is the natural right of the lateral support of land. The rule is that no person can use his land to the injury of another. Therefore, if he should excavate to the edge of his land, and his neighbour had a building adjoining the same, he could not continue this work to his neighbour's injury. Much litigation has grown out of the carelessness or ignorance of persons in not observing this principle. Everything turns on the manner of excavation. This must be done in a prudent manner, otherwise it is a wrong for which the excavator must respond in damages. In nearly every large city this matter is regulated by ordinance.

Nevertheless, the owners of adjacent houses may acquire the right of a lateral support for a wall against that of another; for example, the purchasers of several houses in a block, built, owned, and sold by a single owner. But neither of two persons owning adjoining houses has a right to the support of the other in-

[1] Katz v. Walkinshaw, 141 Cal., 116.
[2] See section 12, § 11 also Chap. 1., § 4.

dependently of agreement; nor does any length of time furnish evidence of one.

34. This easement must be distinguished from the right to use party walls, so called, by which we mean walls used for the common benefit of adjoining houses or buildings. But an owner who sets his house on the land of an adjacent owner, and erects a house thereon and inserts the beams into the wall as far as the line dividing the estates, does not thereby use a party wall as the term is here used. It is not necessary that a party wall should stand equally on adjoining lands. The rights of the parties may be determined by agreements or by user. In cities, especially, agreements are usually made defining the rights of the respective parties. A wall built at the joint expense of two parties, which stands one-half on the land of each owner, does not belong to them as tenants in common. Each owns his part in severalty, though each has a right to use the wall as an easement. If one carries up his part higher than the other, he does not become liable to the owner of the other half unless he is injured by the wall. Prescriptive rights may be acquired in the use of party walls, to which the same principles apply as in acquiring private ways.

35. The owner of land abutting a highway has no right to the lateral support of the soil of the street. Consequently, should the public authority lower the grade, and the owner's house in consequence fall, or the wall be weakened, he would have no claim against the public.

36. A mine-owner has no right to excavate minerals

in such a manner as will endanger the surface. The laws in many countries have provisions respecting the mode of timbering the mines and of leaving portions of the mineral as supports for the land above. In a coal mine, especially if the coal be of fine quality, the temptation is, to use a mining phrase, to "rob the pillars," thereby weakening the roof, and resulting not infrequently in terrible disaster. A sale of coal land with all the privileges pertaining to the working and using of the mines does not give the right to remove the surface supports, even if this be the usual mode of mining; for the usage is illegal. But the purchaser of land containing a release from all liability for any injury resulting from removing the surface supports, may remove them without liability. The right of support for the surface land is limited to the land itself and does not extend to buildings.

37. One may acquire also, as against his neighbour, a right to carry on an offensive trade on his own premises by exercising the right without objection for the period required to obtain a right by adverse user.

38. In like manner a right of fishery may be acquired by adverse user in the manner previously described. But no prescription runs against the owner of the waters, who is a minor, until he has attained his majority. Again, if such a use had begun in his father's lifetime it would be suspended, after his death, during his son's minority.

It is said that "no prescriptive right can be acquired against a sovereign nation or state." This is true

enough in its application to the United States,[1] but is too broad in its application to the states. A careful law writer has stated that the right of the public to lands dedicated to its use for streets, highways, and parks "cannot by one line of authorities be extinguished by any adverse possession, however long continued." By another line quite as long "the statute of limitations runs against municipal corporations the same as it does against private persons."[2]

39. An easement may be acquired in a division fence, whereby the owner on one side may require the other to make and maintain a portion, or all of it. Of course, the right would be extinguished through the purchase of both pieces by the same person. If, on the other hand, the land should happen to be sold on one side to which the burden or benefit was attached, the purchaser would stand in the place of the previous owner, and be subject to the burden or enjoy the benefit, as the case might be.

40. An easement may be acquired in a wharf. One who erects a wharf below low-water mark, which is maintained for the required period, acquires a right to the use of it. His acquisition is limited only by the public right to free navigation, with which he cannot interfere.

41. In some cases an individual can acquire an easement in a landing place. This is determined by local usage. The same thing may be said of the right to

[1] Schneider v. Hutchinson. 55 Or., 253

[2] 14 Am. State Rep., 278. See Orr v. O'Brien, 77 Iowa, 253, and Hoadley v. San Francisco, 50 Cal., 274.

take water from a spring or from a well, or to pass a given place or port free of toll.

42. A customary right to take things from another's land, such as gravel or sand for a building, cannot be acquired in favour of the residents in any particular unincorporated town or village. But an individual or a body politic and its successors may also acquire the right. For a body politic, like a town, to acquire the right, their acts must be of a strictly corporate character, because the acts of individuals are regarded as their own, and not representative acts.

43. An easement may be lost or destroyed in various ways. It may be released by the owner of the dominant estate to the owner of the servient one. It may be lost by abandonment, but a mere non-user will not in any case thus operate. If the non-user be explained by showing that the way was not abandoned, but was less convenient than another which had been acquired, this fact will afford clear evidence of an intention not to abandon the other. A mere non-user for any time, not less than that required by law for establishing a right by prescription, will work an abandonment.

44. What are acts of abandonment? To preserve a dam, partly destroyed, in that condition, is an abandonment. Anyone above or below a mill-owner who tears down his mill with the intention of not occupying the privilege again may employ the stream for a new mill. Intention largely enters into the determination of the question. Thus, one who had an ancient pond, afterward dug three others, and suffered the first to become

filled with rubbish. Subsequently, his title to the latter ponds having proved defective, he made use of the old one. This, the court held, he had a right to do.

§ 12. Individual Use of Waters

1. Right to natural flow of stream.
2. Rights of individuals in other bodies of water.
3. Regard must be had to the application of the principle.
4. What is a reasonable use?
5. Cities are entitled to same rights as individuals.
6. Owner's right in a non-navigable stream to exclusive fishery.
7. Rights of public in public water.
8. Rights of navigation.
9. Rights of public to raise and lower stream.
10. Employment of contiguous land for pleasure.
11. Taking ice from public water.
12. Rights of irrigation.

1. Every riparian owner has a general right to have the stream flowing by or through his land flow in its natural purity. This does not mean that there can be no pollution whatever. Every riparian owner can make reasonable use of a stream, but what is such a use of it is a question of fact — and of increasing difficulty.

2. The principle on which water rights are founded applies to all bodies of water, whether large or small,

tidal or non-tidal, but the rights of the public require those of individuals to be more narrowed in some instances than in others. "The courts," says Farnham, "do not fully agree in their enumeration of these rights. Some concede more than do others; but all accord to the owner of riparian land the right to have the water remain in place, and to retain, as nearly as possible, its natural character. This prevents the obstruction by the public of the water-way, or the pollution of it to the injury of the riparian owner. He is also entitled to have his contact with the water remain intact. This is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. The wharfage right however is subject to some limitations. The right of access also gives the riparian owner a preference should the land under water be sold, the title to accretions, also the preferential right to fill out if this be permitted to the public. He may also use the shore immediately adjoining the land. This gives him the preferential right to secure the ferry franchise and the right to draw nets to his shore and to gather the material thrown on his land by the water. Again, the riparian owner also has the right to the free use of the water space immediately adjoining his property for transacting business. Although the public has a right to navigate every part of the river not actually in use, yet his local interests give him the prior right to make use of the space adjoining his property so that vessels cannot anchor there in a way to interfere unreasonably with his use of his property. "Besides

these rights," says Farnham, "there are others which come to the riparian owners by nature of which he cannot be justly deprived by the public without compensating him." [1]

3. Regard must be had for the occasion and manner of applying the principle; the kind of business; the importance and necessity of the use, and matters of that kind. In a very important case the court remarked that, among other things, may be considered the state of improvement of the country with respect to mills and machinery and the use of water as a propelling power.[2]

4. A reasonable use of a stream may be different in one place from the use of a stream in another. This may be illustrated by a case that occurred some years ago in Wisconsin. The waters of a stream were rendered impure by a cattle-stable, so that the riparian proprietor below could no longer use them for domestic purposes. The court held that there might be such a special damage to the lower owner as would entitle him to a remedy against the upper proprietor. On the other hand, if the use of a stream in that manner by many of the proprietors along its borders was general, this might be a reasonable use of the stream. The

[1] Law of Waters, 279, 280.

[2] The court, after declaring that each riparian owner's right to the flow of a stream through his land in its natural purity must be understood in a comparative sense, added: "But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for such he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of such a court of equity will interpose." Baltimore v. Warren Manufacturing Co., 59 Md., 96.

question was put in another way. All the proprietors along a stream can make the most effective use of it. Is such a use for domestic, commercial or some other purpose? If, on the other hand, it was the principal source of water supply for the people living on its borders and for their cattle, this certainly would be the principal use of the stream, and would determine the character of the reasonableness of its use.

This view was maintained by the Supreme Court of Pennsylvania concerning a stream that was used for carrying off the acidulated waters of a mine. A woman built a fish pond that was fed by the stream. At first the fish flourished; then they sickened and died. After their death followed the discovery that the waters of the pond had become impure by the action of the mine-owners. At the first trial the Supreme Court decided the mine-owners had no right to defile the stream which had been conveying pure water from the earliest days. Unwilling to abide by the decision the mine-owners desired a rehearing, which was granted. On the second trial the court had a larger comprehension of the question. It was then seen that the use of the stream as a sewer or receptacle of the waters of the mines was of much greater consequence than for a fish pond, or even for domestic purposes. The most important use of the stream, therefore, determined the mode of its use, and so the court, reversing itself, held that it was a proper thing for the mine-owners to discharge the waters of their mines in this manner. Necessity, therefore, had established the rule. The water must flow somewhere, and if

the mine-owners were not permitted to relieve their mines of water, which, by natural gravity, must flow into the streams below, they would be obliged to suspend operations.

In like manner a salt-manufacturing company in New York destroyed, by their operations, the use of a stream for domestic purposes. Nevertheless, the court held that this was a reasonable use of the stream. But if a manufacturing plant, which thus pollutes the water of a stream, can continue business without being seriously affected, then a different rule would apply.

5. Cities, as riparian owners, are entitled to the same use of a stream as other owners, and if such reasonable use results in polluting it, no liability follows. In a recent case in New York the court declared that the indispensable public necessity of cities and villages for drainage often rendered the use of such streams as sewers a reasonable one. The courts of Indiana have gone the entire length in holding that a city located on the banks of a stream may discharge its sewage therein, and that it is the necessary and only practical means of disposing of it. In New York the rule is not so sweeping, and the courts declare that this right is not absolute under all circumstances, irrespective of the size of the stream or the natural purpose which it subserves.

In a recent case in Massachusetts the court remarked that, when the population on the banks of a stream becomes dense, it naturally and necessarily suffers a still greater deterioration; roads and streets crossing it, or

running by its side, with their gutters and sluices discharging into it their surplus water collected over large areas, are abundant source of impurity against which the law affords no relief.[1] A city's use of a stream to carry away surface water is generally reasonable.

Cities, then, are governed by the same rule as individuals in using a stream, and if, as incidental to a reasonable use, the stream is to some extent polluted and rendered unfit for ordinary uses by lower riparian owners, they have no just cause for complaint. Furthermore, a reasonable use by a city of necessity causes a greater pollution than does a reasonable use by one individual. But, in an important case in New Jersey, it was held that the pollution of a river by the discharge of city sewage, gathered from a large area by means of an artificially constructed system, could not be justified as a natural and reasonable use of the river.[2]

6. The owner of land through which a non-navigable stream flows has an absolute, exclusive right to fishing therein on his own land. This right must be so exercised as not to injure the rights of others on the stream above or below him.

7. The public have the right to use all bodies of public water. These rights include boating, fishing, and the use of the water or ice for ordinary purposes. In this regard a riparian owner has no exclusive or peculiar privilege.

As the rule is universal, that navigable streams are public, individuals having a right to use them as a high-

[1] Merrifield v. Worcester, 110 Mass., 216, 220.
[2] Simmons v. Paterson, 60 N. J., Eq., 385.

way, this right cannot be taken away or narrowed by any prescription on the part of individuals, though they may acquire some rights, in this way as against other individuals.

8. Except salt-water streams, the question concerning the navigation of a stream is one of fact, and must be established by those who seek to use it. Furthermore, the stream must be navigated in its natural state, unaided by artificial means or devices.

9. The owner by a public body of water cannot prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of high- or low-water marks by artificial means in the exercise of rights common to all, unless he has express authority to do so by law.

10. The employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command a remedy for interference with its natural condition.

11. The taking of large quantities of ice from a body of public water, to ship to a distant market for sale is not the exercise of the common right if this results in a special injury to a riparian owner. Consequently he may enjoin the taker from cutting and removing the ice, and also sue in his own name for the damage he has incurred. This rule, though, does not prevail everywhere.[1]

The taking of water or ice from a body of public water by common right may result in destroying the

[1] See Chap. I., § 4.

source of supply, and no riparian owner or common user can complain; but when the use is made of such water for commercial purposes, not of common right, the right of using the water in the above manner ceases where the conflict of interest with the common use for commercial purposes begins. In other words, the use of the water for commercial purposes is deemed of the highest importance, and therefore determines its use whenever a conflict of uses arises.

Lastly, the taking of ice from a body of public water as a business and for sale, is not an ordinary use of the water by common right. It is an artificial use, which may be enjoined by a riparian owner who is thereby injured.

12. Lastly may be considered the right to use water from a stream for irrigation purposes. The rule has long existed that the riparian owner may thus use the water so long as he did not infringe on the rights of other persons having an equal right to the water. And as the population spread to the western part of the country where the rainfall is not sufficient to furnish an adequate supply for crops to grow the rule was applied there. This right to use the water for irrigation purposes is a property right of which the riparian owner cannot be deprived except for public use on making or tendering due compensation. And the right is available not only to the owners of the land, but also to one who has located on land belonging to the government with the intention of obtaining title thereto.

To what extent may water be thus used? If the climate is unusually arid, and the character of the

soil is sandy, with a small flow of water it would be very easy for the persons owning land near the head of the stream to consume the entire flow and leave nothing for the riparian owners lower down. The first limitation is, that the water must be principally used for the support of life, by furnishing what is necessary for quenching the thirst of men and animals and for cooking their food. Another limitation is, that the use of water for irrigation cannot be so exercised as to interfere with the lawful use of water by a lower proprietor. Again, how is this right affected by the existence of other rights, for example, the right to use the water for milling purposes? Farnham says:[1] "While the two rights may be equal so far as their respective claims are concerned, the natural position of the one desiring to use the water to furnish force is superior to that of one wishing to use it for irrigation, because his use does not consume the water but leaves it to flow on to the lower owner, and therefore he has an advantage not possessed by the one desiring to irrigate his land. But both the right to utilize the flow of the stream to furnish power and the right to use the water for irrigation are inferior to the use of it for quenching thirst, and, as between the two, the question which is superior may depend upon the locality, needs, and customs of the people." In a manufacturing community where milling interests have been established on the faith of the right to the flow of the stream, and the ordinary rainfall is ample to supply the needs of agriculture, it may be that water cannot be taken from

[1] 3 Law of Waters, p. 1899.

the stream so as to interfere with the flow of water to the mills. "In other sections of the country the conditions may be such that the agricultural interests are paramount, there being few mills, and the need of them not great. Under such circumstances it may be unreasonable for one requiring a mill upon the stream to insist that there shall be no interference with his power by the diversion of the water for agriculture." The final rule therefore is, "that the use made by every owner after the necessities of life are satisfied must be such as to be reasonable under all the circumstances of the case, with no priority in favour of any interest." What is a reasonable use is a question of fact, in view of all the interests involved and all the circumstances under which the respective owners desire to make use of the stream.

CHAPTER V

THE USE OF HIGHWAYS

1. In driving each must keep to the right.
2. This rule is not always applied.
3. Especially when crossing or turning into a road.
4. A person driving on the wrong side assumes the consequences.
5. All who use a public street must exercise reasonable care.
6. Rights of travellers going in same direction.
7. Rights of walkers.
8. Rights of children and infirm persons.
9. Duty of persons carrying dangerous tools.
10. Duty of a person transporting articles that may frighten horses.
11. Travelling at a dangerous speed.
12. Criminal liability for fast driving.
13. A traveller must keep his carriage and harness in good condition.
14. Liability for a runaway.
15. Liability is often determined by the proximate cause of the injury.
16. Liability when both are at fault.
17. A passenger is not responsible for negligence of driver.

18. Rule that applies to a servant.
19. Right to stop.
20. Right to drive animals through the street.
21. Use of new means of travelling.
22. Bicycle.

1. In describing the rules of the road the most general of all is that each party must keep to the right. This is directly contrary to the English rule. Where the rule is not prescribed by statute, courts will take judicial knowledge of the custom. And a statute providing that a traveller shall pass to the right of the centre of the road means the centre or travelled portion. When this is hidden by snow and a temporary path is made elsewhere, persons who meet therein should drive to the right of the centre as if it were a permanent way.

2. The above rule is not inflexible. Occasionally there are good reasons for not observing it. Thus, on some occasions a light vehicle should give way to a wagon heavily loaded; on others, the heavier wagon should stop and suffer the lighter vehicle to pass. Nor does the general rule apply to a building which is being moved through a street. If the movers are acting in accordance with law in thus obstructing the highway temporarily, persons who are passing to and fro must govern themselves accordingly.

Another limitation must be mentioned: the rule does not apply to driving in city streets.

3. The above rule does not apply to those who are crossing or turning into a road, nor to a driver who

meets a walker. A person while driving across a road must not obstruct public travel unduly and prevent others from passing along the way.

Street railways are not exempt from the operation of this rule. They must not unnecessarily obstruct the crossings. Travellers in other vehicles need not refrain from using the track at proper times; provided they exercise due care, and do not impede the movement of the cars.

4. A person who drives on the wrong side of the way assumes the risk of his conduct. Furthermore he must use greater care than if he kept on the other side. Should he collide with another the presumption would be against the person who was on the wrong side; nevertheless the other has no right to neglect all precautions. If the collision could have been prevented by his exercise of ordinary care, he cannot complain.

5. Persons who lawfully use a public street owe to each other the duty to exercise reasonable care, and every one is justified in assuming that every other person will act in the same manner.

6. What are the rights of travellers driving in the same direction? The leader is not bound to turn to either side if there be sufficient room for the others to pass. If there be not enough, Angell has said it is the duty of the foremost traveller, after a request has been made to him, to yield an equal share of the road to the requester, provided he can pass. If he cannot the passing must be deferred until the travellers reach a more favourable place. Elliott, the last

and best authority on this subject, says it is perhaps doubtful if such a duty can be deemed absolute, and even if it should be so considered, the failure of the leading traveller to turn out to one side will not justify the other in purposely running into him or attempting to pass at all hazards. The certain rule is a person who attempts to pass another going in the same direction must do so in the manner most convenient under the circumstances. If damage results in passing the passer-by must answer for the consequences, unless the other by his own carelessness brought disaster on himself.

7. Persons who walk on a highway have rights equal to those who drive or ride on horseback. Both classes are required to exercise prudence. A footman who undertakes to cross a street at a regular crossing has a just cause of complaint against a driver who recklessly drives into him. It is therefore the duty of both parties to move cautiously and carefully at crossings. A footman who attempted to cross a street in New York City in front of a rapidly moving vehicle was injured, yet failed to recover because the court declared he was negligent in attempting to cross the street at that place and time under the circumstances.

8. Children and infirm persons, as well as others, have a right to walk along or cross the street of a city. They have a right also to assume that carriages or horses will not be driven at an improper rate of speed. A driver, therefore, must take reasonable care not to injure such persons.

9. Again, persons often walk along the street carrying tools and merchandise of a somewhat dangerous character. Not infrequently one is seen carrying a bundle of rods and, absorbed by the exciting scenes around him and forgetful of his dangerous bundle, pokes a rod into the eye of a passer-by. The poker is clearly answerable for his negligence whenever he was not observing under all the surrounding conditions due care.

10. A person who is transporting over a highway articles of an unusual character which are likely to frighten horses, must employ persons to give warning to travellers and, if need be, assist them in travelling.

11. Again, travelling at a dangerous rate of speed on crowded streets is, in most cities, forbidden. To violate such an ordinance is negligence. It is said that where no ordinance exists a person is justified in travelling at a lively rate, even in the streets of a city. The rate of speed should be proportioned to the danger. Therefore reckless and noisy driving, whereby other horses are frightened and run away, is an actionable injury.

12. There may be a criminal as well as a civil liability for injuries caused by fast and reckless driving. Thus, two persons raced on a highway, and one of them ran over and killed a footman; both were declared guilty of manslaughter, on the principle that if two persons incite each other to do an unlawful act resulting in death to another, both are guilty.

To drive a mile in four minutes has been declared

unlawful, and one who while driving at that rate collided with another driving at ordinary speed, and killed him, was declared guilty of murder in the second degree. Many cases of a similar nature have happened, resulting in similar punishment of the offenders.

13. A highway traveller must keep his carriage and harness in good, roadworthy condition; as the old English law expresses the idea, he must have a good tackle, and is negligent if he does not.

Occasionally a harness or wheel will break. This is not negligence in itself, for it may be a pure accident which could not have been prevented by using reasonable care. In other words, a traveller is not an insurer of his harness or vehicle. Thompson thus expresses the rule: If damages are inflicted by reason of the breaking of a carriage or tackle of a traveller on a highway, the traveller or owner of the tackle or vehicle is liable only on the principle of want of ordinary care.[1] Elliott says that this is unquestionably the true rule, for only those who enjoy unusual privileges or undertake unusual things are considered as warranters or insurers, and a traveller simply exercises a right free and common to all when he drives along a road or street.

14. The running away of a horse on a highway is not conclusive negligence on the part of the driver; but if no explanation is given, negligence may be presumed. Sometimes a horse gets loose and runs away. His flight may be the result of negligence in

[1] Thompson on Negligence, p. 381.

hitching him, but it is said that to leave a horse unhitched on a highway is not negligence in itself, especially if the animal is watched by a competent person.

To leave a horse loose in a city street is negligence, whether the animal is vicious or not. If a horse runs away through the owner's negligence the owner will be liable to one who is injured thereby, provided the latter was not guilty of negligence on his own part. But injuries caused by a runaway horse will not make the owner liable unless he or his servant in some way were liable.

15. Not infrequently one's liability turns on the answer to the question, what was the proximate cause of the injury. Thus a team was left unhitched in the street, and in attempting to stop it, the runaway collided with another properly hitched. This caused the latter to run away and collide with a horse standing by the pavement and properly secured. The driver of the first team was liable to the owner of the horse against which the second team ran, as the injury was the natural, proximate result of the first driver's negligence.

16. Very often both drivers are at fault, and it is difficult to render exact justice between the offenders. Elliott[1] in his excellent work on the subject thus formulates the rule in cases of concurring negligence: "(1) If the plaintiff is without fault, and there is negligence on the part of the defendant and another independent person over whom the plaintiff has no

[1] Roads and Streets, § 845, p. 921.

control, both negligences partly directed causing the accident, the plaintiff may maintain an action for all the damages so caused him against either the defendant or the other wrong-doer. (2) If, in like case, the negligence is partly that of the defendant personally, and partly that of his servant, the plaintiff can maintain an action either against the defendant or his servant. (3) If the negligence is that of the defendant's servant, although the defendant may be free from personal negligence, the plaintiff can maintain an action against either. (4) If the negligence, although not of the defendant personally nor of his servant, consists of an act or omission of another, so done or omitted by the order, direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or such third person. (5) Although the plaintiff, either in person or through his servant, has been guilty of negligence, if such negligence 'did not directly it partly caused the accident,' the plaintiff can maintain an action against the defendant who did cause it. (6) If the plaintiff is personally guilty of negligence which 'partly directly' caused the accident, he can maintain an action against anyone. (7) Notwithstanding the defendant or his servant may have been guilty of negligence, the plaintiff cannot, as a general rule, maintain an action, if by the exercise of reasonable care, he or his servant could have avoided the accident."

17. The above rule applies to the drivers of vehicles or to the owners. In another chapter we have considered the rules that apply to servants, but one

other point remains for consideration. A person who is merely a passenger in a public or private conveyance, exercising no control, is not responsible for the conduct of the driver. But if he knew that the driver was drunk or otherwise incompetent, it would be his duty to take such action to prevent an accident as the circumstances might require.

18. The opposite rule applies to a master driven by a servant. The story has been often told of Lord Abinger, whose coachman on one occasion drove him along a street in London at a rapid rate. Abinger fearing that his servant would run into something and well knowing the rule of liability, shouted out to him, "Drive into something cheap."

19. Travellers on foot or in carriage may stop a reasonable time by the wayside, but cannot interfere with the rights of others. On one occasion a traveller stopped, leaving his wife to watch the horse, which, becoming frightened by a Punch and Judy show, ran away. Nevertheless the owner of the other horse with which the runaway collided could not recover for the injury. A foot traveller may stop to tie his shoe or get a drink at a *fountain* without losing his right as a traveller.

This right must be used in a reasonable manner. In a city a coach or carriage cannot stop an unreasonable time to solicit passengers. A man cannot keep wagons constantly in front of his store in a manner seriously interfering with the use of the street by the travelling public. It is negligence to hitch a horse by the roadside in such a manner that the hind

wheels of the carriage will extend into the beaten track.

20. Cattle may be driven, of course, along a highway, but this must be done in a reasonable and careful manner. There must be greater care in driving them through a city street than along a country road. Also in driving wild cattle, like those from the southwestern plains, than cattle more domesticated.

Should they escape while going along the highway and, through the driver's negligence injure someone or his property, the owner would be liable. On the other hand, if he were exercising proper care nothing could be recovered. Once a butcher bought an ox at a market and while the animal was going through the street it became excited, rushed into a china shop, and tried to hide among the crockery. Yet the hardly less excited butcher was not responsible for the damage wrought by this unexpected detour of the animal.

21. Travellers are not confined to the use of horses and ordinary carriages. How far they may avail themselves of new locomotion is an unsettled question. Elliott says that new and improved means must have been contemplated when the streets were laid out and fitted for public use. He thus states the rule: "When new means of locomotion come into general use among travellers on highways which is not dangerous when properly managed, and which does not seriously interfere with the proper use of the highway in other modes, we think it cannot be deemed unlawful in itself." The courts have gone so far as to hold

that the use of a steam traction engine on a highway was not necessarily a nuisance.

In a recent case in Rhode Island the Supreme Court thus declared: "It cannot be doubted that the [owner of a machine has] a right to transport it over the highway. Any person has a right to transport over it elephants and animals which may frighten horses, also loads of goods which from their height or appearance or the noise made in transporting them may frighten some horses. But a person who drives along a highway an object or animal which from its appearance or noise is likely to frighten horses should take the precaution of having persons to warn travellers of the danger and thus prevent injury." This seems a reasonable rule, and anyone who disregards it ought to pay for the ill consequences of his conduct.

22. Finally, a word may be said concerning the use of bicycles. A few years ago they came into sudden use and many injuries were caused before they became the subject of regulation. Many of the ordinary rules of negligence apply to the riders, and whether they have violated them or not is a question of fact to be ascertained by the jury as in other cases of negligence.[1]

[1] Whether a bicyclist who crossed a highway on his bicycle so near to a horse drawing a vehicle as to frighten him and cause a runaway, resulting in the death of one of the occupants of the vehicle, was guilty of negligence, was held to be a question of fact. Shortsleeve v. Stebbins, 77 N. Y. App. Div., 588.

CHAPTER VI

FARM LAW

1. What goes with purchase of land.
2. What goes with house.
3. What is included in mortgage deed.
4. Rights of proprietors adjoining a highway therein.
   - *a.*— Shade trees.
   - *b.*— Herbage.
   - *c.*— Use of street for depositing building materials.
   - *d.*— Use of street for displaying goods.
   - *e.*— Abutter's rights against others who use highway.
5. Condemnation of land by railroad companies.
6. Reasons for preferring to purchase.
7. Railroad fencing.
   - *a.*— In many states company is required to fence.
   - *b.*— Kind of fence required.
   - *c.*— Gates.
   - *d.*— Period within which fence must be built.
   - *e.*— Liability for animals lawfully on track.
   - *f.*— Liability for animals on track through lack of proper fence.
   - *g.*— Liability for animals unlawfully on track.

h.— Liability for frightening horses, etc., in running trains.

8. Liability of railroad company for fires:
   - *a.*— Must use proper means to prevent fires,
   - *b.*— Its duty to extinguish them,
   - *c.*— Land-owners are not required to guard against fires,
   - *d.*— When company must guard specially against them,
   - *e.*— Liability of company for fires beyond adjoining land,
   - *f.*— Liability of company in some states by statute for all fires.

9. Fences between farms:
   - *a.*— Triple object of them,
   - *b.*— Stranger has no right on unfenced land of another,
   - *c.*— Partition fences,
   - *d.*— Duration of such a fence,
   - *e.*— What action may be taken against the one who refuses to build,
   - *f.*— Fence viewers must follow the law,
   - *g.*— Until division no particular portion belongs to either owner,
   - *h.*— After division is made liability of the one neglecting to build,
   - *i.*— Bailee or keeper of cattle is liable for damage done by them,
   - *j.*— What kind of division fence owner may erect,
   - *k.*— Removal of partition fence.

10. What may be done with animals trespassing on one's land:
    a.— May be impounded,
    b.— Impounding ordinances must be reasonable,
    c.— Notice of sale,
    d.— Rights of non-resident.
11. Fence laws in South and Southwest:
    a.— Reason for different rule,
    b.— Cattle cannot stay on land of another against his consent.
12. Feeding on land enclosed in common.
13. Liability of owner of cattle for damage done to third owner of land by unlawfully going through land of second owner.
14. Law relating to dogs:
    a.— When an unregistered dog can be killed,
    b.— When killing of registered dog is proper,
    c.— Dogs may be killed that chase or attack sheep.
15. Remedy for stealing or killing a cat.
16. Contract of employment.
17. Use of explosives, etc., in making excavations.
18. Removal of dangers, like an unsound tree.

Besides the legal principles contained in the previous chapters relating to the ownership and use of land, other matters will be here added to complete this part of our work.

1. At the outset let us try to define more clearly what goes with the land at the time of purchasing.

Of course, the fences are included, and also fencing material that may happen to be piled up on the land at the time of its sale. Standing trees are also included, those that have been blown or cut down, and are lying where they fell. But wood prepared for the market still belongs to the grantor of the conveyance.

Manure, also, whether lying in the barnyard or in a compact heap, passes with the farm.

2. There is greater difficulty in determining what passes to the purchaser with the house. A brick furnace goes with it, but the courts are not so unanimous in including portable furnaces. An ordinary stove with a pipe running into the chimney is excluded, while a range set in brickwork is not. Mantelpieces that cannot be removed without marring the plastering are included, while those resting on brackets can be taken away. The subject of gas fixtures has long puzzled the courts.

The Supreme Court of Pennsylvania more than sixty years ago decided that gas fixtures and chandeliers were personal property and did not pass by the sale of land to the purchaser. The court founded its rule on the older rule or usage. "There is really nothing to distinguish this new apparatus from the old lamps, candlesticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they were fixtures which it would be waste to remove. It is therefore more simple to consider all these gas

fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights or table lamps, as governed by the same rule as the article for which they were substituted."[1] And this rule has ever since been maintained in that and in other states. In Missouri the gas fixtures in a church did not pass by its sale by virtue of the same principle.

This rule does not prevail everywhere, and its weakness is clearly shown, we think, in the following utterances of an English judge. "The gaseliers are a part of the gas pipes, and, to use a legal expression, they take their nature, and are included in the fixtures, which go with the house under the lease. They are as much a part of the gas pipes as the mill stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes which are of no practical use when separated from them."[2] This rule has been followed by a larger number of courts than the other; does it not rest on a sounder reason?

Pumps, sinks, water pipes, and all other fixtures attached to them for supplying water also pass with the deed, for they are as needful to enjoy the land as the land itself. To these rules may be added others stated by a careful writer: "If the farmer has iron kettles set in brickwork, near his barn, for cooking food for his stock, or other similar uses, the deed of his farm covers them also, as likewise a bell attached

[1] Vaughen v. Haldeman, 33 Pa., 522.
[2] See 17 Am. Decisions, 686–696.

to his barn, to call his men to dinner. A cider mill goes with the apple orchard, and not with last year's crop of apples. If he has a cattle barn on the premises the tie-up planks, stanchion-timbers, tie-chains, and hinge hooks used for fastening the animals in their stalls belong to the barn, and not to the cattle. If the farmer indulges in ornamental statues, vases, etc., permanently erected, and resting on the ground by their own weight merely, and sells his estate without reservation, these things go with the land. But even this might not be so, if the article had just arrived and never been placed or fitted to its position on the lawn."

Other matters which have come within judicial inquiry and are held to pass with the land conveyed are the following:

A bar fastened by nails and screws to the wall and floor of a saloon, bookcases forming also the washboard around the floor: a hat rack built into the room; cisterns supplying the house with water, whether outside the house or in the cellar; cooking coppers, washtubs and water tubs, curbing enclosing a burial lot and a stone monument, a large hotel desk fastened to the floor; an electric annunciator attached to the wall, a hotel sign attached to a post on the sidewalk, in front of a hotel; ice in an icehouse standing on sold premises; an organ in a church; partitions in a store; paintings on canvas cemented to the ceiling, platform scales resting on a permanent foundation; a tramway in a quarry.

The following things are not included in such a con

veyance: Carpets and curtain rods; movable china-closets and movable screens; a cooking range fastened to the floor of a hotel; counters; meat racks; an ice-box used in a grocery and meat shop; a safe in a bank though bricked up; a weather vane with the owner's name attached to the roof of a house; marble slabs on brackets but not screwed to them; a play-house built of boards picked up and nailed together by several children, including those of the vendor, stuffed birds attached to movable metal trays in cases fastened to the walls of a private museum.[1]

3. The same writer has added that in mortgage deeds there is one important difference "that any additions for permanent improvements upon the land after the mortgage is given, belong to the land, and go with it, so that if the farmer, after mortgaging his farm, erects a new barn, or other outbuildings, but fails to pay the mortgage debt, and the mortgagee forecloses, the owner will lose the whole, new and old, though it be twice the value of the whole mortgage debt."

4. Elsewhere we have described the rights of those who use a highway as a means of going from one place to another. But the adjoining proprietors have other rights that are peculiar and important. They have a right to the land itself subject only to the right of passage and repair by the public, and this right is often of no little worth. Such a proprietor may sink a drain below the surface, may carry water in pipes across or along the way, or mine minerals underneath.

[1] These examples are taken from Vol. 13, American and English Encyclopedia of Law, 667, 668.

In perhaps the larger number of states the trees belong to him unless needed for repair of the way. A curious case is reported of a woman who, under the direction of the highway surveyor, cut the grass growing in a highway in order that her children might be able to go to school without wetting their feet. Thus far she was guilty of no wrong, but, after cutting the grass, she carried it away and gave it to her husband's horse, which ate thereof. The second act was a trespass, and still worse, it related back and included her entire conduct.

(*a*) In Maine an adjoining owner may plant shade or ornamental trees within the highway, provided the public is not thereby impaired, and a highway surveyor who should destroy them would be a trespasser.

A row of trees planted near a boundary line is not a nuisance to the adjoining proprietor merely because it renders his land unfit for an unused purpose. Nor does the projecting of their trunks a few inches on the land of the adjoining proprietor, though not far enough to prevent him from plowing and cultivating it as near the line as he could otherwise, create a nuisance.[1] But an owner may enjoin an adjoining owner from planting trees like willows near the boundary line which, by spreading their roots into and branches over another's land, would be to him a serious injury.[2]

(*b*) Whether the adjoining owner is entitled to the herbage growing in the highway is a question not

[1] Grandon v. Olson, 78 Cal., 611.
[2] Brock v. Conn. and Passumpsic R. Co., 35 Vt., 373.

easily answered. In some states there are statutes empowering local boards to permit cattle to run at large on public highways. It would seem, says Elliott, that if the herbage belongs to the owner of the land "it cannot be taken from him either wholly or in part without compensation," but the courts do not think alike on this question. One of them has declared that "the owner of the soil is not deprived of the pasturage any more than he is of the way. He can enjoy both in common with his neighbours." The Supreme Court of Connecticut maintains a different view, which is approved by the leading author on this subject. "The right on the part of the public to depasture the land is not necessary for the exercise of their right to pass over it, and the exercise of such a right on the part of the owner is not inconsistent with the public right; the land is not, therefore, sequestered for that purpose when it is laid out as a highway, and no damages are given to the owner for the loss of any such right. On a careful consideration of the subject we are fully satisfied that the granting or authorising such a license, no compensation having been in any manner provided for the owner of the land upon which it is to be exercised, is beyond the constitutional power of the legislature. It constitutes the taking of the property of one person for the use, either of another, or of the public. If of the former it cannot be done, either with or without compensation; if of the latter it may be done, but only on providing compensation."[1]

[1] Woodruff v. Neal, 28 Conn., 165.

(*c*) Another right belonging to abutters is the use of a street in front of their premises for depositing building materials, and for loading and unloading merchandise. This temporary use of a street is justified by necessity. The primary purpose of streets, so the highest court of New York has remarked, is for travel and transportation, and any interference with this is deemed a public nuisance. But like so many rules this also has an exception. "An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods through the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without creation of what in the law is deemed a nuisance."[1]

Such a use by an abutter must be temporary and reasonable — a question of fact — a justifiable use by one proprietor may furnish no justification for a longer or larger use by another. An eminent English judge once remarked that an abutter "is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard."

(*d*) Some other applications of this rule have been stated by Elliott that may be added. "No one has a right to appropriate a portion of a street to his exclusive use in displaying his goods or carrying on his business, even though enough space be left for

[1] Elliott on Roads and Streets, § 694, p. 848.

the passage of the public. Nor has a tradesman any right to so conduct his business as to collect a crowd of people in front of his store to such an extent as to interfere with public travel. And the owner of land over which a highway is laid out has no right to obstruct it merely because he has not been paid for the land; nor because he has opened a new road, although the latter may be as convenient for the public as the old way."

(*e*) Lastly, an abutter has all the ordinary remedies of a land-owner against one who makes any use of a highway outside or beyond the public use of it. Thus, he can maintain an action of trespass against anyone who unlawfully cuts and carries away his grass or trees, or who, standing on the sidewalk in front of his premises, abuses him and refuses to depart. An abutter may, by a proper action, compel a railroad company to remove its track which has been placed on the highway without paying him damages therefor. It has the same right to proceed against an individual who has unlawfully encroached thereon.

No man has a right to deposit his carts or merchandise in front of another's premises. Should the wrongdoer neglect to remove them after receiving notice to do so, the other can remove them to a suitable place. An owner of a drove of cattle who stops to feed in front of another's land is as responsible as if he turned them into the owner's field. Says another: "No person's children have a legal right to pick up apples under your trees, although the same stand wholly outside of the fence. No private person has

a right to cut or lop off the limb of your trees in order to move his barn or other buildings along the highway; and even if the owner of the building has a license from the proper authorities to move the same through the streets, this does not exempt him from liability to private sufferers. And no traveller can hitch his horse to your trees on the sidewalk, without being liable if it gnaws the bark or otherwise injures them, and you may untie the horse, and remove him to some safe place. If your well stands partly on your land, and partly outside the fence, no neighbour can use it, except by your permission. Nay, more; no one has a right to stand in front of your land and whittle or deface your fence, throw stones at your dog, or insult you with abusive language, without being liable to you for trespassing on your land; he has a right to pass and repass in an orderly and becoming manner — a right to use the road, but not to abuse it."[1]

5. Farms are often invaded by railway companies. Great civilisers, nevertheless their coming has often been very unwelcome, especially when coming too near the farmer's door, disturbing his animals by day and himself still more by night.

Railroad companies either purchase the right to use the land for making a track, or purchase the entire title, thus becoming absolute owners. Whenever they fail in their negotiations for the use or sale of it, then they can take as much as may be needed by virtue of authority granted by the state. No

[1] Bennett's Farm Law, p. 38

state would permit a railroad company to do this if it were not regarded in a very real sense as a public corporation, obliged to transport passengers and merchandise at reasonable times and rates. Formerly, proceedings for taking land were more common than they are at present.

6. Companies now seek, as far as possible, to purchase the use, or the land outright, rather than resort to the legal methods of condemnation. One reason for adopting this course is, the juries who determine the value of the land taken generally have a strong regard for the farmer, and award high damages. Railroad companies therefore know from costly experience that to buy is cheaper than to condemn. Of course, in purchasing, the parties may make any agreement they please, within legal limits, concerning the use of the land that is to be taken.

7. The fencing of the land acquired by a railroad company is an important matter and is often the subject of agreement.

(*a*) By statute the railroads in many states are required to maintain fences along their ways; in others no fences are required, but the companies are responsible for all injuries done to cattle through their ignorance of the hot and powerful nature of a locomotive. Doubtless a time will soon come when kindness to beast and economy in management will unite in erecting proper barriers against these invasions.[1]

[1] "As a railroad company may grant a right of way across its location, one may be granted over it by prescription in favour of an adjoining proprietor." Baldwin's American Railroad Law, p. 146.

(*b*) If no special kind of fence is prescribed by statute, any kind that is reasonably sufficient will suffice. The usage of a locality is important. A barbed-wire fence may be sufficient, and has indeed come into general use. When thus used by the consent of law or usage a company will not be liable if cattle, frightened by the noise of a train, run into it and suffer injury.

If the company has specially agreed with an adjoining proprietor to maintain a sufficient fence, and through its failure to observe the agreement, an animal is killed, he can recover for the loss. Again, such an agreement or covenant runs with the land benefited and against the land charged, as respects subsequent grantees.

(*c*) "When there is a gate in a railroad fence," says Baldwin, "made and maintained for the use and convenience of an adjoining proprietor, the duty of keeping it closed rests on him, and may be enforced if need be by an injunction. If his cattle wander through and are killed, it is for him to show how it was left open, and if it appears that some stranger opened it, he cannot recover without showing that the company knew, or ought to have known, that it was open, and had time and opportunity to have it closed." [1]

(*d*) Again, the statutes sometimes specify the time within which fences must be built. If no statutes on the subject exist they must be built as soon as they are needed to give the required protection.

[1] American Railroad Law, Chap. XVII., § 4, p. 151.

(*e*) Some questions still remain concerning animals that attempt the dangerous feat, either of walking the track, or walking along or across it, the latter experiment often proving just as difficult and fatal as the former. When they are lawfully on the track, as they may be, for example, at crossings or at other places where a fence cannot be possibly maintained, trains should be run with reasonable care to avoid collision with them. But the law is clear that this duty is inferior to that of saving the lives of passengers. Consequently, to lessen the danger to them, a train, when approaching a herd of cattle on the track, if it cannot be stopped before reaching them, may be rushed at still greater speed, though with the sure result of a greater loss of animal life.

(*f*) If an animal strays on the track by reason of the company's neglect in not building a fence required by contract or statute, even though due care was used in running the train, and is killed or injured, the company is liable. Whether the owner could recover if when turning his animal out to pasture he knew that the fence was defective or wanting, often depends on the statute regulating the matter.[1]

If a company has built a proper fence that has since become defective, the ordinary principles governing the relations of adjoining proprietors at common law apply. To turn cattle out into a pasture adjoining a railroad, immediately after a severe storm which

[1] In an action by B against A to recover for injury to A's livestock from a barbed-wire fence which separated their lands, A cannot recover if he turned his stock into a pasture adjoining the fence, knowing that it was in a dangerous condition and likely to inflict the injury. Ray v. Stuckey, 113 Wis., 77.

has prostrated fences in many places, without first looking to see if the railroad fence was in good condition, might be inexcusable negligence.

A different rule applies to a non-adjoining proprietor. If his cattle stray into the land of an adjoining proprietor, and through this upon the railroad, the owner has no cause of action against the company.

(*g*) If cattle without any right go upon a railroad track properly fenced the company performs its whole duty in using ordinary care, after they are seen, to avoid running them down. So much care the company must exercise, even though the owner was negligent in not looking after his cattle. Again, it is said that if the way is unfenced and none is by law required, "the train hands, in passing through territory much used for pasturage, should be on the lookout for cattle on the track; for it would there be natural to look for them occasionally to stray in that direction." In Alabama the highest court has declared that a railroad company, which runs its trains in the night time at such a rapid rate of speed that it is impossible by the use of ordinary means to stop the train and prevent injury within the distance in which the cattle could be seen by the aid of a headlight, is negligent.[1]

Cattle are rarely on a railroad lawfully except at a crossing. In approaching this a train must be run with ordinary care to prevent injury. A signal should also be given, as the attention of animals is attracted by noises. A failure to give signals by bell

[1] Louisville & Nashville R. v. Kelton, 112 Ala., 533.

and whistle in many states is declared by statute to be negligence. This rule though does not apply to cattle that have strayed away from their owners and are on the track as trespassers. A mule that once forsook its owner and strayed on the track was killed. The owner tried to recover on the ground that the engineer neglected to ring the bell and blow the whistle. But the court said that "if it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule, to 'stop, look, and listen.'"[1] The owner, therefore, was as helpless in law as his mule was before the engine that took his life.

(*h*) Lastly, to run trains under the most favourable conditions is risky, and animals are constantly frightened, especially by the whistle and by the general movement of the train. Horses are frightened by the passage of a train over or beneath them. The most frightful accidents occur in this manner, yet rarely can any damage be recovered of the company. It is simply doing what the law authorises. "If, however, such noises are unnecessarily and unexpectedly made, in such a way as to frighten horses lawfully on the railroad premises, their owner may be entitled to recover."[2]

[1] Fisher v. Pennsylvania Co., 126 Pa., 293. "Where the principles of the common law obtain, a horse set loose to pasture on the road near a railroad crossing, which strays upon it, is, even in a state where the fee of the highway is owned by the adjoining proprietors, and they therefore have the right of pasturage upon it, unlawfully upon the railroad, and his owner is guilty of contributory negligence. If a runaway horse dashes on the track at a highway crossing ordinary care is due to avoid injury to him, and, for want of it, the owner can recover, if he used reasonable diligence to recapture the horse, and was not in fault for the original escape from his control." Baldwin, Chap. XVIII., §§ 9, 10, p. 434.

[2] Baldwin, Chap. XLIII., 11, p. 434.

8. Another subject hardly less important to farmers who live along a railroad is the question, who shall suffer for the loss caused by the sparks emitted by a locomotive? the railroad or the land-owner? A railroad is not liable for fires caused by locomotives unless there was something wrong in the mode of its construction or operation. As a locomotive properly equipped and run does not ordinarily cause fire, if it is caused in that manner, both by statute and by common law, the fire is regarded as the result of the company's negligence. "It is almost necessary for the attainment of practical justice that such a presumption should be made. The condition of the locomotive and the mode of its operation will naturally be best known by the company, and probably known by it only." Of course, the company can overcome the presumption by clear and satisfactory evidence. To that end it may show that an engine, which is presumed to have caused the fire, was equipped with the proper fire screens and carefully operated by a competent engineer. On the other hand, the farmer may show the quality, size and character of the sparks thrown out from the locomotive, and may also "prove by expert testimony that such sparks would not be thrown out from a proper engine in proper repair."[1]

(*a*) The company is bound to use the best means, spark arresters or other contrivances in common use to prevent fires. Though not required to adopt the latest most effective invention, the company is chargeable with negligence if it does not procure

[1] Baldwin, Chap. XLIV., § 2, p. 438.

those which have been thoroughly tested in practice and found the best. Statutes sometimes exist requiring the use of some particular safeguard, and if they appear to have intended to prescribe the only precaution to be taken, no other need be.

(*b*) Again, a company, though not negligent in starting a fire, may nevertheless be responsible for not putting it out. It is not "absolutely bound" to stop a freight or passenger train for this purpose, but there are occasions when such action is needful. The courts have differed on this question. The Supreme Court of Missouri denies the responsibility of a railroad to act in the way of putting out or preventing the fire from spreading. Its reasoning is interesting, for it applies more widely than to a railroad company. "If a fire should originate on A's premises through no fault of his, and should extend to B's and consume his property, A, if not liable for the occurrence of the fire, would not be liable on the ground that carpenters whom he had employed in repairing a building on his premises or labouring men whom he had employed to dig a ditch through his farm had neglected to extinguish it. If not liable for the origin of the fire he cannot be held so on account of the neglect of a social duty by persons in his employment in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society." [1] But other courts perceive that on such occasions railroad companies have a clear duty to perform that

[1] Kinney v. Hannibal & St. Joseph R., 70 Mo., 243, 257.

should not be lightly disregarded. "There is no hardship," says the Supreme Court of Texas,[1] "in requiring them not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business if this can be done by the exercise of ordinary care." The court further adds a principle of more general application:

"Every person has the right to kindle a fire on his own land and for any lawful purpose, and if he uses reasonable care to prevent its spreading and doing injury to the property of others no just cause of complaint can arise; yet although the time may be suitable and the manner prudent, if he is guilty of neglect in taking care of it and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done." [2]

(*c*) Land-owners along the line are not required to adopt special means to guard against fires that may be set by locomotives, nor to refrain from using their premises in the ways common among society. For example, they are not required to use metallic instead of shingle roofs, nor to maintain a fire apparatus.

(*d*) On the other hand, railroads may be negligent in not having a watch kept at a point of special danger; for example, at wooden bridges, which may easily

[1] Missouri Pacific R. v. Platzer, 73 Tex., 117, 122.

[2] "If track repairers cook a meal on the side of the track and a fire spreads therefrom to adjoining land, the company could not be held unless it knew of, or authorised such a use of its grounds, and the authority of the foreman of the section-gang would not be sufficient. For fires negligently set by independent contractors, in the construction or improvement of the railroad the company is not liable, if the work was such as, even if properly done, would have resulted in a fire." Baldwin, Chap. XLIV., § § 8, 9, p. 444.

be set on fire by a train and spread, thereby causing the destruction of other buildings. Again, if buildings thus exposed are erected by lease or license on land belonging to a railroad company, it may stipulate against loss caused by fire from any locomotive of the company.

(*e*) The company may be liable, not only for injury to land adjoining its own, but to other land perhaps far away, if the fire had a negligent origin, or if this character is given to it by statute. One who starts a conflagration is responsible for all its consequences. "If," says Justice Baldwin, "he starts it on a windy day, or in a windy season, when the fire is exposed to a wind blowing in a certain direction, he has some reason to anticipate that the flames or sparks may be carried that way. In such cases it is for the jury to determine whether the plaintiff's injury was the natural consequence of the defendant's act. The company may be liable for damages done many miles from the railroad."

(*f*) By statute railroads in many states are made liable for all fires set by their engines, regardless of their non-negligence. Wherever this liability prevails they have an insurable interest in all property near their line. Its responsibility for losses is commensurate with its power to insure itself against them. On goods temporarily and transiently found along its line it may not be able to procure insurance. Such a statute, making a railroad company an insurer against fires set by its engines, does not give an action to owners of goods in its own hands, as a warehouse-

man, which are thus burned. Their rights we have considered elsewhere.

9. Leaving the questions that concern more especially farmers who live near railroads, resulting from their creation, we will consider some questions that concern farmers everywhere. One of these is the building and maintaining of fences.

(*a*) A fence serves a triple purpose — to mark a boundary, to restrain one's animals from going astray, to prevent the intrusion of animals belonging to others. While no one by the common law is obliged to maintain a fence for the latter purpose, he is required to keep his cattle either by means of fences or by watching them from intruding on his neighbour. Says Blackstone: "Every man's land is, in the eye of the law, enclosed and set about from his neighbours; and that either by a visible and material fence, as one field is divided from another by a hedge, or by one ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field." [1]

If, therefore, one's cattle enter the land of another, the entry is a trespass, the owner is liable, nor will any degree of prudence excuse his act. This rule is so far modified that the owner of cattle which go astray while he is driving them along an unfenced highway is not liable if he regains them with reasonable promptness.

(*b*) A person has no right to drive his cattle over the land of another simply because it is not fenced.

[1] See § 11, describing a different rule in the South and Southwest.

On the other hand, if animals enter the land of another, whether it is fenced or not, the latter, of course, may turn them back, but in doing so he can use only ordinary means, such as a prudent man would employ. He must not in his wrath inflict needless injury on them. And if he neglects this simple rule, whatever may have been the provocation, he cannot escape paying for his conduct. What a quietus would be wrought by the enforcement of an effective method of collecting a penalty in advance of the impending outburst!

(*c*) To prevent these things fences have been erected in the older and better settled parts of the United States, and the obligation to build and maintain them is often statutory, but the obligation may also be created by agreement and prescription. The statutes, however, apply more especially to partition fences.

The building and maintenance of partition fences may be done by agreement between the respective owners, or by statute. But the requirement should not be overlooked that an agreement for building and maintaining such a fence is in many states, though not in all, within the statute of frauds, and therefore to be effective must be in writing.

The statutes providing for partition fences cannot be easily described, as they vary so greatly in the different states. Some of them, however, may be set forth possessing a general nature. They must be built upon the line between the adjoining owners, and, if more than half is built on the land of one without his consent, he may remove the excess, even though

in so doing he removes the entire fence. Worm fences also come within this rule, the centre of the rails being regarded the dividing line between the adjoining lands. A partition fence between the lands of adjoining owners is presumed to be the common property of both. If originally built on the land of one of them it is his; but if built on the land of both, and at their joint expense, each is the entire owner of the part on his land.[1]

The statutory division is made by fence viewers who act on the application of one or both parties.

In some states these officers constitute a permanent tribunal; in others they serve for only one occasion. The office is in its nature judicial. Says the Supreme Court of Iowa, in construing the statutes of that state on the subject: "Their jurisdiction is limited to matter involving the obligation of adjoining owners to erect and maintain partition fences; the assignment to each his share of the fence to be built and maintained; the prescribing of time within which it shall be built, and in case of failure to build, and the building by the other party, the ascertaining and certifying of the value of the fence."[2] In other states the function of fence viewers is essentially similar.

(*d*) How long is the division thus made binding between the adjoining proprietors? As long as the lands continue to be co-terminous and no changes arise to disturb the equality of the division. When, therefore, there is a change in the ownership of a portion of the land, there may be a new partition.

[1] Quillen v. Betts, 1 Penn., 53.
[2] Peschongs v. Mueller, 50 Iowa, 237, 238.

(*e*) On default of one adjoining owner to build and maintain the portion of the fence assigned to him by the fence viewers, the other party may build the entire fence and receive the value of the portion of the party in default, such value to be determined by the fence viewers. In some of the states twice the amount of the cost of the portion thus built for the one refusing to build may be recovered. Furthermore, the fence viewers, when requested, may determine the sufficiency and value of the fence as a preliminary to recovering the amount of the delinquent.

(*f*) If fence viewers fail to comply with the statutes defining their authority their proceedings are void; otherwise they are final unless they have been guilty of fraud or have made a mistake. They cannot determine a fence to be partition fence which is not. They have no authority whatever to so establish division lines.

(*g*) Until there has been a division by agreement or by action of the fence viewers, no particular portion belongs to either owner. "Each party," says the Supreme Court of Massachusetts, "is equally bound to move in the matter; and until such division there can be no deficiency or neglect alleged as to the fence of either party, separately and individually. If either, therefore, puts cattle on his own land and they enter upon the land of the adjacent proprietor, there being no partition of the fence separating the lots, he will be liable to an action of trespass therefor." [1]

(*h*) After the partition has been effected, the one

[1] Thayer v. Arnold, 4 Met., 589.

who neglects to build his portion is liable for the injury done by his cattle on the land of his neighbour. On the other hand, the delinquent is without a remedy for the injury done by his neighbour's cattle that take advantage of the situation to invade his grounds. Says the court in a well-considered case: "After the fence has been divided the owner of a close can sustain no action for damages done by horses or cattle breaking into his close, through defect in the fence which he was bound to make and repair, if they were rightfully on the adjoining land." [1]

(*i*) Sometimes cattle are fed on the land of another for a stipulated compensation. This is called agistment. Before the owner can lawfully obtain them he must pay to the agistor the amount due for their feed and care. The keeper, however, has no lien on them for his services except by special agreement. An action will not lie against the owner of cattle for injuries done by them while they are in the agistor's possession. "He is the qualified or special owner. He stands in the place of the owner for the purpose specified, and the trespasses of the cattle are his trespasses." [2] But if the owner were to select a known reckless and irresponsible agistor, and the cattle while in his possession would be likely to commit injuries, the owner would be responsible for them. [3]

[1] Laurence v. Combs, 37 N. H., 335. Where horses trespassing on A were owned by several persons, not jointly, but severally, were kept together in a common herd on the owner's farm, and were under the joint control of all the owners, and they broke through B's portion of a division fence, which was out of repair, and damaged A's crops, A could maintain an action against all the owners jointly. Ozburn v. Adams, 70 Ill., 291.

[2] Rossell v. Cottom, 31 Pa., 528.

[3] Ward v. Brown, 64 Ill., 307.

(*j*) An adjoining owner may erect a division fence as high and close as he pleases, nor can the opposite owner object to the use of the materials used, nor to the obstruction thereby caused to his view and light.[1] In a recent case the Supreme Court of Indiana thus remarked: "The fact that the division fence erected by A was close and high, and made of rough and unsightly materials, and that it cut off the view from B's lot, and shaded and thereby injured her garden, did not render the fence a private nuisance, nor entitle B to have A abated. A had the right to build a partition fence, a house, or any other structure on his premises, and along the entire length of the line dividing them from the real estate owned by B. The latter had no easement of light, air, or view in or over A's lot, and she had no legal cause for complaint if these were interfered with or entirely shut off by the erection of a fence, house, or other building. A had the right to use his premises, and every part of them, for any lawful purpose which did not deprive the adjacent owner of any right of enjoyment of her property recognised and protected by law. The erection and maintenance of a division fence thereon was a lawful use of A's land and no legal right of B was violated or invaded thereby. A's motives in putting up and maintaining the division fence were

[1] Abutting lot owners on city streets have a right to light and air which cannot be taken away from them under any conditions. "The abutting lot holder has the right to the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy the comfort, enjoyment, or use, to be deprived from the casement to which he is entitled." Townsend v. Epstein, 93 Md., 537. "Lot owners have a peculiar interest in the adjacent street, viz., easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves." 8 Dillon on Municipal Corporations, § 712 (4th Edition).

unimportant. He had a legal right to construct and keep up the fence, and, having such right, his motives in asserting and exercising it did not impair or destroy the right."[1]

(*k*) Another point should be added concerning the removal of partition fences. Such a fence built wholly on one's land is his property and, unless the statute prescribes a different rule, the other cannot maintain trespass for its removal. Nevertheless he has a remedy for injuries arising from its removal if the owner was bound to maintain it for the other's benefit. But a different rule applies to a pasture fence built on the line between adjoining lands. This is the common property of both, and either may maintain an action for its removal or destruction by the other. On one occasion one of the owners of such a fence set back his half fourteen feet on his land, and the other sued him and recovered damages. The remover, so the court remarked, acted on his supposed ownership of the materials. This was a slender foundation for the right claimed — "to remove a structure dedicated to important uses, the subject of legal duty and legal protection, a barrier erected as a landmark of boundary, a partition of property, and a means of preserving the fence of society."[2]

10. When the animals of a neighbour are in one's land he may pursue one of three courses with respect to them. He may impound them, or sue the owner

[1] Giller v. West, 162 Ind., 20, citing many cases. See Chap. BI., Sec. 4. § 3.

[2] Stoner v. Hunsicker, 47 Pa., 514.

for damages, or turn them into the highway and thus give them another chance to return into his own land, or into the land of another. The last is the easiest method, leaving one's feelings out of account, the first is perhaps more effective.

(*a*) The right to retain animals running at large in the highways and other public places is regulated largely by statute. But the right extends further, to the impounding of animals trespassing on one's premises. It is said that "the mere trespass of animals will not justify their seizure and detention. Moreover, the strict construction put upon the right of distress requires that the taking must be before the trespassing animals leave the premises."

The statutes provide that the animals be advertised with an accurate description of them. A person who takes up an estray and fails to advertise it as the law requires cannot acquire the right to it through time and possession. Before the taker-up is required to deliver the animal the owner must prove his property before a proper officer and procure an order from him requiring the taker-up to deliver the animal to the owner. The owner should also tender the fees for posting and keeping the animal before receiving it; indeed the keeper has a lien on the animal for these charges. Their amount is usually regulated by statute.

A person who takes up an estray and complies with the requirements of the statute becomes a bailee or keeper during the time he is required to keep it. He is vested with a qualified property which becomes

absolute on failure of the owner to appear and prove his property within the time prescribed. The statutes, however, are construed strictly against the party claiming the benefit, and he must follow their provision closely.[1]

(*b*) The power of towns and other public bodies to enact ordinances providing for the taking up and impounding of animals running at large is unquestioned, as such ordinances partake of a penal character. The ordinances must be reasonable and be strictly construed in favour of the owner of property thus taken. In one of the latter cases the court said: "To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the streets, without an adjudication of the offense in the courts, seems to be a harsh remedy. But how this summary mode of proceeding can be avoided without surrendering the whole police power to protect the public highways from such an encroachment which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed, cared for and kept until the owner pays the expense and takes them away. If he fails or refuses to do so they must be sold."

(*c*) Notice of the sale of the impounded animals by public authority is needful. An ordinance providing for their sale without this would be uncon-

[1] 2 Cyc., 362.

stitutional. The notice need not be personal; it is sufficient if posted or published in such a way that it will probably reach the interested party.

(*d*) Lastly, a non-resident is not exempt from the operation of an impounding ordinance, because it relates rather to property than to persons. If it is related strictly to the latter it would be inoperative, because an ordinance cannot have any force beyond the limits of the issuing power.

11. As we have seen, every man is obliged to confine his cattle to his own land, and if he neglects his duty he is liable for any trespass they commit on the land of another. But in the South and Far West the opposite rule prevails: cattle must be fenced out, and a stock owner is not liable because he permits his cattle to range over unenclosed land not belonging to himself. In permitting them to thus range at will he is not guilty of negligence. Such land is in a sense regarded as a common, or "range." Nor is its state of cultivation important.

(*a*) The reason for this radical change in the rule has been given by Justice Brown in expounding the fence law of Texas. "There are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the Government owned them, cattle had been permitted to roam at will for pasturage. It was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular and oblige cattle owners to incur the heavy expense of fencing their land, or

be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorise cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owners, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorised, or rather condoned, was an accidental trespass caused by straying cattle."[1] Therefore a cattle owner may turn his animals to wander of their own accord, nor is he required to restrain them from grazing on lands which he knows belong to another. But he has no authority to drive and keep them there.

(*b*) The wilful herding of cattle on the unenclosed land of another without the consent and against his protest is another question and requires a different answer. As the court said on one occasion, while the owner of cattle may not be liable for their going on the land of another, it does not follow that because such browsing is excusable as a trespass, it is a matter of right. "It is an immunity, not a privilege, or at most a license revocable at the will of the tenant, who may turn his neighbour's cattle away from his grounds at pleasure." To drive cattle, therefore, on the land of another wilfully for the purpose of confining them there is therefore just as unlawful in Texas as in New York.

[1] Lazarus v. Phelps, 152 U. S., 81.

Again, in thus feeding one's cattle on the land of another no title is thereby gained to the land itself as against the true owner. "He will not be permitted thus to ignore the truth that everyone is entitled to the exclusive enjoyment of his own property."

12. When the lands of several proprietors are enclosed in common, but used separately, though without division fences, the common law, just mentioned, still prevails, unless changed by statute. In such a case each owner must keep his cattle within his own enclosure.

13. Lastly, a land-owner is required to fence only against cattle which are lawfully at large and on adjoining ground; consequently if cattle which are *unlawfully there* go upon other land they are trespassers, and the lack of a fence around the second enclosure is no defense against their wanderings.

14. Before concluding our observations concerning animals, the dog claims peculiar attention. The judicial mind has been puzzled in determining whether to classify him as property, or as a base kind of property. This much is certain: the ancient assertion that it is not larceny to steal a dog since he is not property, while it is larceny to steal a dead dog's hide, is no longer true; the world makes progress, even in establishing dog law. One writer has declared that "a dog is property in the fullest sense of the term." Says another: "The craven who would wantonly injure him is the subject of a fine. The thief who would steal him may be declared a felon and rendered infamous in the eyes of the law and his fellow citizens.

Human life may be taken justifiably in the defense of his possession; and he is made the subject of the taxable burdens of the Government. He has been the friend, companion and solace of man; and the law only recognises the testimony of human nature, history and poetry in withdrawing him from outlawry." Yet the dog with all his fine qualities has some very bad ones, and strangers more often meet a dog, especially a large one, with more dread than pleasure. Consequently the public right to regulate the keeping of dogs is unquestioned. Very generally their owners, in order to keep them, must obtain a license, for which a tax is paid; he must put a collar around his dog's neck, and during a part of the year perhaps must muzzle him. If the legal requirements are not heeded dogs in many states, though not in all, may be killed without notice to their owners.

(*a*) To kill an unregistered dog is an extreme act, but the justification rests on the belief, which must be well founded, that a dog is a dangerous animal. "So far as a dog is a nuisance or a menace to society, he may be summarily killed at the common law, and for this matter, any other domestic animal may be." A writer, after maintaining that a dog was property, thus continues: "The destruction of any form of property without notice or hearing may in certain emergencies be justified, but the emergency must be extreme that authorises the destruction of property without due process of law. And due process of law has the same application to property in dogs that it has to property in other animals. An ordinance or

statute authorising the killing of a dog forthwith, or without an opportunity for a hearing on the part of its owner, simply because he is not licensed or registered, or is without a badge or collar, permits the taking of property without due process of law, and can find no justification in law or morals. That they may be impounded, and after a reasonable time destroyed if not redeemed by their owners, after a reasonable opportunity to do so, we have no doubt. There is no public necessity for their destruction in a more summary fashion."[1]

(*b*) Even the lives of registered dogs are by no means secure. All depends on their good behaviour. Hence arises the very important question, what act or conduct on the part of a dog justifies an individual in killing him? On one occasion A saw a dog in front of his home, and discovered that he had left some tracks on his freshly painted porch. Wrathy, he procured his gun and shot the offender. The owner of the dog having sued A for damages, his wife testified that she found him one night in the henhouse, and the next morning she made the sad discovery of a broken egg. The remainder of the justification was that the dog came around A's house at night, chased the cats into the trees and barked. Thus, the dog not only annoyed A and his wife, but the cats still more. A though never informed the dog's master of these things. The court declared that "the law does not justify one in killing his neighbour's valuable dog under these circumstances. It might as well be con-

[1] 90 Am. St. Rep., 215.

tended that it is justifiable for one to shoot a neighbour's horse because he is in the habit of breaking into his enclosure, or making a noise around the house at night." [1]

(*c*) As dogs have a peculiar propensity for killing sheep, by statute in many states their owner is fully justified in killing any dog that attacks or chases them. The more general rule justifying such action has been thus stated by the Supreme Court of North Carolina: "The law authorises the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. The law is different where the dog is chasing wild animals, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified."

One of the best statements of the law on the subject is by Justice Butler.[2] "Whether before mis-

[1] Bowers v. Horen, 93 Mich., 420. The vicious character of a dog may be shown by its repute in the locality where it is kept. Fisher v. Weinholger, 91 Minn., 22.

[2] Woolf v. Chalker, 31 Conn., 129. The following points stated and explained in this case contain an excellent summary of the law on this subject:

Although the common law recognises property in the dog, it has always been esteemed a *base* property, and entitled to less consideration and protection than property in other domestic animals.

Any person may kill a *mad* dog, or one that is justly *suspected* of being mad, or that is known to have been bitten by a dog which was mad.

If a dog becomes mischievous and inclined to injure *property*, his owner is bound to restrain him *on the first notice;* and is liable for any injury he may thereafter commit to property of *any kind*.

Although a dog, by entering alone on the land of another and doing mischief, can not subject his owner to an action of trespass, as cattle and other animals which are inclined to rove and prey upon crops may do, yet, if the owner trespass, and his dog attend him and do mischief unbidden, that action will lie for the injury.

Whether before mischievous or not, or his owner know it or not, if found *at large*, doing or attempting to do *mischief*, or it is absolutely necessary for the preservation of property, he may be killed.

chievous or not, or whether, if so, the owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his owner as the charge of a keeper, he may be killed and the act justified at common law. And so he may be destroyed under any circumstances where it is absolutely necessary for the preservation of property. Other animals may become vicious and injure persons or property, and the injured person may have his action, but may not kill them. The discrimination against dogs results legitimately from their proneness to mischief, their uselessness and liability to hydrophobia, and the consequent base character of the property in them, and the necessity for that protection."

15. In this review of dog law, the dog's delight, pussy should not be omitted. Blackstone says that "among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the

A dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed.

A *ferocious* dog, accustomed to bite mankind, is a *common nuisance*, and if found at large may be destroyed by anyone.

The *keeping* of such a dog is *wrongful*, and, prima facie, the owner is liable to any person injured, and the plaintiff may recover without averring *negligence* in *securing* or *taking care* of him; nor is negligence of the plaintiff a defense.

The owner of such a dog is liable if he bite a person in consequence of being *accidentally* trodden upon, or because *irritated* by a *child*, or if he attack or injure a *trespasser*.

Such a dog is a *dangerous instrument* for protection, and keeping him for that purpose can only be justified in cases where the keeping of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner under his personal direction be justified, where a like degree of injury may not be inflicted lawfully by a different instrument.

King's household, for which there was a very peculiar forfeiture."[1] A cat, like a dog, is a base kind of property, of doubtful value, and for that reason cannot be stolen. Anyhow, this was the decision reached with respect to a Baltimorean cat. The animal belonged to Mrs. A and was found in B's house, who refused to surrender his lively possession. B was accordingly arrested on a charge of larceny and kept in custody for a couple of days before the idea dawned on the minds of those who had taken part in arresting him that cat stealing was perhaps not a criminal offense. Four wise lawyers were consulted — two opined one way, two the other. The Attorney-General of the state then dispelled the darkness that a cat was not property in the legal sense that it could not be stolen. The prisoner was at once released, but this was not the end, for he sued his prosecutors for false imprisonment.[2]

If a person cannot be prosecuted for stealing a cat he may be compelled to pay damages for killing it, even though it be only a base kind of property — that is, unfit for food — although during the Franco-German War large numbers were eaten. Chitty, an eminent English law writer, has written that "trespass lies for taking any animal or bird out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises

[1] "If anyone shall steal or kill a cat being the guardian of the King's granary, let the cat be hung up by the tip of its tail with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat." The quantity of wheat required for covering up the animal was the measure of forfeiture. See note to Ingham's Law of Animals, p. 33.

[2] 40 Central Law Journal, p. 41.

of the owner and afterward killing or injuring a cat, which is not considered of any value in the law." Poor pussy! If Chitty is correct thou art an outlaw, but what says a Canadian tribunal? "I have no hesitation," says Judge Lonsdale,[1] "in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat, but it is not justifiable to do so merely because it is a trespasser, even though after game."[2]

16. Another topic of every-day importance is the legal nature of the different kinds of contracts for employment. This has been fully considered in the last part of our work, and nothing therefore need be added here.

17. There is a legal maxim that one must use his property in such a manner as not to injure another. In applying this maxim, if a landowner in improving his land, does so unskilfully or negligently, whereby others are injured, he is liable for the loss. Thus in using explosives, he should not use such powerful ones as to injure his neighbour's house, especially when he can avoid such a result by using a milder explosive, or a smaller quantity, or by pursuing some other way, even though the expense would be greater. And if the effect of blasting would be to shake down a neighbour's house, its occupant would have the

[1] Whittingham v. Iderson, 8 Upper Canada Law Journal, 14. I have come across this case in Mr. Ingham's excellent work on the Law of Animals.

[2] A friend told the writer that he paid forty francs ($8) for one, nor did the price distress him so much as the fear he could not obtain another for any price.

right to apply for an injunction against the blaster, as the recovery of damages would be an inadequate remedy and compensation.[1]

Again a land-owner may excavate on his own land, close to the line of the adjoining owner, but if the excavation is made in a negligent, wrongful or reckless manner, the person excavating will be liable for the full consequences of his acts, not merely for the injury to the soil itself, but to the improvements thereon.[2] Even if the excavation be made by an independent contractor, the owner of the land is liable for the injury caused to the house of an adjoining owner, when the consequence might have been reasonably anticipated, and no notice had been given to him to protect his property. But if a person who intends to excavate his own lot, near to the wall of an adjoining house, and below its foundation, gives reasonable notice of his intention to the adjoining owner, the latter must protect his own property, and the other is not liable for damages that may happen if the excavation is made with ordinary care.[3] This is the rule at common law. "There is no obligation on the part of an excavating owner to protect the walls and buildings of an adjoining owner by shoring, underpinning, or the like, though conditions may exist which will necessitate protection of some kind because of the duty of exercising reasonable care. In some states statutes regulate the depth to which

[1] Hill v. Schneider, 13 N. Y. App. Div., 299.
[2] Note, 33 Am. St. Rep., 468.
[3] Bonaparte v. Wiseman, 89 Md., 12.

excavations may be made in designated localities and require persons making excavations on their land beyond the prescribed depth to protect walls and buildings of adjoining owners from injury. This duty does not end with the completion of the excavation. But as to one excavating within the prescribed limits the rule of the common law applies and there is no duty to furnish protection."[1] Of course if the excavating owner agrees with the other to protect his building from the effects of the excavation, he is liable for the injuries caused by his negligence.

The difficulty of adjusting the rights of adjoining owners with respect to excavations has led some states to pass statutes regulating the depth to which they may be made and requiring the excavator to protect the adjoining owner from injury if this depth be exceeded.[2]

An important distinction exists when the work is done by an independent contractor. The general rule is when a contractor is pursuing an independent employment, and is free to exercise his own judgment in the use of means, he alone is liable for any negligence or unskilfulness arising from the undertaking.[3] But when the resulting injury is one that might have been anticipated as the probable consequence of the work, then the employe is liable therefor.

18. An owner of land on which something dangerous exists, like a tree in an unsound condition which is

[1] 1 Cyc., 780.
[2] In Ohio the limit is nine feet, in New York, ten feet. 1 Cyc., 781.
[3] Deford v. State of Maryland, 30 Md., 179.

likely to fall if struck by a heavy wind, and injure the adjoining owner's property, should take proper action to remove the danger, and if he does not, he is responsible for the consequences.[1] This rule has often been applied to walls left unsafe, and tottering after a fire.[2]

[1] Gibson v. Denton, 4 N. Y. App. Div., 198.
[2] Sessingut v. Perry, 67 Ind., 408.

CHAPTER VII

PERSONAL PROPERTY

What is Personal Property; Animals

1. Basis of classification.
2. Transformation of real and personal property.
3. Importance of understanding the change.
4. What property is personal.
5. Animals; how classified.
6. Ownership of wild animals in natural state.
7. Actions against owners of ferocious animals.
8. Application to domestic animals.
9. Dogs.
10. Herds of wild or partly wild cattle.
11. Bees.
12. Owner of land may forbid others from hunting on his land.
13. To whom increase belongs.
14. How animals must be kept by baiter or keeper.
15. What kind of horses livery stable keeper must keep.
16. Engagement of hirer.
17. Liability of keeper who furnishes driver.
18. When hirer is liable to owner for death of horse.

1. The classification of property into real and personal is based wholly on the character or quality of the property itself. This is the chief distinguishing mark, but it is not infallible, for, under some conditions, land becomes personal property, and personal property is sometimes transformed into real. Thus, a tree, while standing, is real property; cut it down and convert it into furniture, and it becomes personal property. Coal stored in the earth is real property; mine it, and its character is changed into personal property.

2. In like manner personal property may be changed into real. A familiar illustration is bricks and mortar, which are personal property when movable, but, fashioned into a house, become a part of it and thus a part of the land whereon it stands. Finally, the house may be pulled down; and then the materials that formed the structure return to their original quality as personal property.

3. It is important to understand the transitory or changeable nature, to the legal eye, of all property.

4. We have already defined land. All other property is personal. We shall now proceed to describe the various kinds of personal property, and the modes of acquiring absolute ownership thereof.

5. Animals are personal property, and the law classifies them as tame and wild, applying very different principles to the two classes. To the former belong horses, cattle, sheep and poultry. Of the names of the wild animals no mention need be made,

but when they become domesticated, as they often do through capture and taming, then some difficult questions arise concerning the time when their nature has been so transformed from wild to domestic animals, as to require the application, respectively, of different legal principles.

6. In their natural state wild animals are not owned by anyone; a right to them can be acquired only by capture or possession. In like manner if, after their capture, they escape and return to their original state, ownership in them immediately ceases. This rule is somewhat qualified, as will soon appear.

In order to acquire a right to wild animals they must be caught. To the hare especially this rule has long had a familiar application. Capture can be effected by means of traps, snares, and other deceptive arrangements, or by shooting. A wounded animal does not become the property of the hunter unless he follows up his advantage with reasonable diligence. In like manner the old Roman law declared that property in a wounded beast could not be acquired until the animal was actually taken.

When the killing or capturing is complete, ownership in a wild animal is as perfect as ownership in a tame one, or in land, peanuts, or anything else. Thus, doves kept in a dovecote are domestic, and a person may be liable to indictment for stealing them. More generally, young animals that are tame, and practically within the dominion of the owner, belong to him, and the taking of them is a theft.

Whether the submission of a wild animal is so

complete as to put him in the other class is a question of fact. If they run away, but return to their master, his ownership in them is preserved, notwithstanding their propensity to play the tramp. If, on the other hand, an animal of this kind should lose himself and return to the woods and show no disposition to return to his owner, another person would be justified in capturing him and asserting his ownership or in killing and devouring him.

7. An action lies against the owner of a ferocious animal, dog, cat, or other beast, for injuries inflicted on one who is free from blame. It must be proved that the animal was vicious, and that the owner knew of its real character.[1] Animals that are known to be dangerous to mankind ought to be kept from doing injury; otherwise their owners will be responsible for the damage done by them to property or persons.

8. In applying this principle to damage done by a domestic animal it must be modified. To fasten a liability on the owner he must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to do injury. With

[1] "If a man have a beast that is of a wild nature, as a lion, a bear, a wolf if he get loose, and do harm to any person, the owner is liable to an action for damages, though he have no particular notice that he had done any such thing before. The same principle applies to damages done by domestic animals, except that as to them the owner must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. With notice to the owner of such propensity in the animal, he is liable for whatever damages may be suffered by any person or property therefrom. It makes no difference whether the animal was of cross and savage disposition, and committed the injury by reason of its viciousness and ferocity, or whether such injury resulted from good nature and playfulness — the intent of the animal is not material. The owner or keeper, having knowledge of its disposition to commit such injuries, must restrain it at his peril, and it is no answer to say that the animal was not cross or savage, and was in good nature and playfulness." Crowley v. Groonell, 73 Vt., 45.

notice to the owner of such propensity, he is liable for whatever damages may be done by his dog or other animal to any person, or to his property. The difference is inconsequential whether the animal committed the injury by reason of his viciousness and ferocity, or from good nature and playfulness—the intent of the animal is not material. The owner or keeper, having knowledge of his disposition or capacity to commit such injuries, must restrain the animal at his peril.[1]

9. Dogs partake of the character of both wild and domestic animals. By reason of their common use they have become the creatures of statutory regulation. Nowadays, almost everywhere the registry of dogs is required; even after this is done, they are not entirely within the control of their owners. Therefore one has a natural right to destroy a dog or other animal doing injury on his premises. Thus, a person has a natural right to defend a flock of sheep from the attack of a dog, and would be justified in killing him if need be to protect them. Unless the emergency is perilous, the more appropriate course is to drive off the unwelcome intruder, or to restrain him from doing damage.[2]

A collar worn by a dog and having a man's name

[1] In an action on a Kentucky statute providing that any person keeping dogs shall be liable to anyone injured by them, containing also the provision that no recovery shall be had in case the person injured is on the owner's premises after night, or engaged in an unlawful act in the daytime, the owner of a dog is liable for injuries inflicted on a person when he is in the owner's custody or in the custody of a kennel club on exhibition. Bush. v. Wathen, 104 Ky., 548.

The owner of a vicious animal passing through a city street must restrain the beast from injuring anyone. 68 S. E. Rep., 764.

[2] See Chapter VI., § 13.

thereon is evidence that he is the owner. But it is not conclusive evidence, and does not prevent the admission of other evidence to disprove ownership.

10. Herds of cattle on remote lands are usually branded by their owners. Cattle raised in this manner are subject to elaborate regulations.

11. Among other wild animals may be mentioned the busy bee. When hived they belong to the person who captured them. If they afterward depart his right of ownership continues so long as they are within his ken. He also has a right to pursue and capture them, even though they should settle on a tree belonging to another. But he cannot gain title to bees when trespassing on the premises of another person.

12. Land-owners may forbid all others to enter on their premises for the purpose of hunting wild animals, and, after receiving such a notice, they are trespassers unless positive laws have been enacted to the contrary. In England, for many centuries, laws have existed enabling persons under various conditions to pass with the utmost freedom over the lands of others to engage in their sports of game. In this country our policy is very different, and hunters have less protection and regard. It is enough to say that after one has been forbidden to enter on the land of another, and is a trespasser, he cannot acquire any title to anything he may capture while thus acting as an intruder.

13. Any increase of domestic animals belongs to the owner of the dam or mother; hence, the owner

of a cow is entitled to the calf, of the mare, to the foal, etc. This is in harmony with the Roman law, and is the rule everywhere.

14. When animals are put into the keeping of others, they must be fed and perhaps sheltered. The law implies that they are reasonably fit for the work which they are hired to perform. On one occasion a mare was hired to be used in operating a street railway. The company had the right, so the court said, to assume that she was suitable for such work, that it was only required to use and treat her with reasonable care, that if after doing so it was plainly manifest that further use would be injurious and endanger health and life, it was their duty to use her no longer without notifying the owner and obtaining his consent.[1]

15. When one lets a horse for hire, he impliedly promises or warrants that the animal is fit and suitable for the purpose for which it was hired, and that the horse is not unruly or vicious, but is safe, and manageable. Furthermore a livery stable keeper should inform himself of the habits and disposition of the horses kept by him, and if he knows that they are dangerous and unsuitable for the purpose for which they are generally used, or could ascertain this fact by reasonable exertion, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and ears and thus remain ignorant of the vicious habits of his horses, and relieve him from liability

[1] Bass v. Cantor, 123 Ind., 444.

for injuries to a customer resulting from such habits.[1]

16. A person taking a horse to hire engages to take the same care of it that a prudent man would of his own property, and is responsible for all injuries that result from his neglect.[2] If the horse becomes sick, or exhausted, he should abstain from using the animal, and if he pursues his journey he is liable for all the injury that may result. Likewise if bad usage or want of care on the part of the hirer produce death, the value of the horse may be recovered.[3]

The hirer also agrees to put the animal to no other use than that for which it was hired, to return it at the time appointed, to pay the agreed price for its use, and in general to observe whatever is prescribed by the contract, by law or by custom. The hirer who, by improperly feeding and watering him, has made him sick and returned him in this condition to the owner, is liable for his full value, if the owner by the use of reasonable care and by supplying a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him.[4]

17. Again, if one hire a carriage and horse to go a journey, also a driver from the owner, and the horses are injured by immoderate driving, the person who hired them is not liable to the owner for damages unless he interfered with the action of the driver.[5]

[1] Conn v. Hunsberger, 224 Pa., 154.
[2] Thompson v. Harlow, 31 Ga., 348.
[3] Graves v. Moses, 13 Minn., 335.
[4] Eastman v. Sanborn, 85 Mass., 594.
[5] Hughes v. Boyer, 9 Watts, 556.

18. Lastly, the owner of a horse who has let the animal to go a specified journey within a given time, cannot recover for the loss of the horse when it was driven only in that time, and by the stipulated way and driver, if its death results from overtaxing the animal to fulfil the agreement. But when the hirer continues to use the animal after the expiration of the specified time, or beyond the specified place or by some other route, such departure from the terms of the agreement, unless compelled by circumstances which the hirer could not control, is a wrong for which he is liable. And this rule is applied even if the hirer be a minor or the contract of hiring be void by reason of violating the Sunday law.

CHAPTER VIII

MODES OF ENTIRE OWNERSHIP

§ 1. By State Grant

SUBDIVISION 1. PATENTS

1. For what granted.
2. To whom granted; aliens.
3. Meaning of discovery.
4. What may be patented.
5. A principle cannot be.
6. Patent for process.
7. Patent for machines and improvements:
   a.— What is a patentable machine,
   b.— What is a patentable improvement,
   c.— What is a manufacture.
8. Patent for composition of matter.
9. Distinction between machine and manufacture.
10. Design must be new and useful.
11. Distinction between important and unimportant inventions.
12. Difficulty in drawing the distinction.
13. Substitution of superior for inferior materials.
14. To enlarge and strengthen a machine is not a patentable invention.

15. Aggregation is not invention.
16. Omission of parts is not invention.
17. Combination of old device into new article.
18. Want of invention can be detected by above rules.
19. To change form of machine may, or may not, be a patentable invention.
20. Change of proportion.
21. What an inventor is presumed to borrow.
22. Foreign patent.
23. Invention must be novel.
24. Novelty of design.
25. Novelty is a question of fact.
26. On whom rests the burden of proof of novelty.
27. Invention must be useful.
28. Abandonment.
29. Invention is a question of fact.
30. Every machine must be constructed, as well as invented.
31. Inventor need not be constructor.
32. Application.
33. Petition.
34. Specification.
35. Claims.
36. Applicant's signature.
37. Application by executor or administrator.
38. Fees.
39. Drawings.
40. Model.
41. Specimens of composition.
42. Date of application.
43. Examination.

44. Rejection of application.
45. Appeal to commissioner.
46. Appeal from commissioner to court of appeals.
47. Amendment of application.

1. In the early days of our National Government Congress enacted laws securing to inventors the fruits of their inventions. Any person who invents or discovers a new and useful art, machine, manufacture or composition of matter, or new and useful improvement of the same, may obtain therefor a patent.

2. Only a person who invented the thing patented or an assignee or representative of the legal inventor can lawfully obtain a patent. Consequently, a patent obtained by one or two or more joint inventors would not be valid. It is not true that the co-inventor invented the thing patented, but only assisted. If he could have a valid patent for the thing or process, each of his co-inventors would have likewise, and a strangely mixed interest would exist.

A patent obtained by several persons for an invention by one of them is void. Again, should several independent inventions be severally claimed in a joint patent, and one of these inventions be made by one of the joint applicants, the claim to the patent covering that invention would be void.

The law also provides that aliens who intend to become citizens may obtain patents as a reward for their inventive genius.

3. The word discovery in patent law does not have

its broadest significance. By discovery is really meant an invention. The same man may invent a machine, and discover an island, or a law of nature. For doing the first thing the law would grant to him a patent; it cannot grant him one for discovering an island or a natural law.

4. The statute provides for patenting four classes of things. They include an art, a machine, a manufacture, a composition of matter.

These inventions are the results of original thought, as distinguished clearly from a discovery of the laws of nature. A law of nature that is discovered may be utilised by means of an art or a machine, and this, not the discovery of the law itself, is rewarded by a patent.

5. In 1729 Stephen Gray discovered the electric current, and, in 1820, Oersted made the discovery that it would deflect a magnetic needle placed in its neighbourhood.[1] The discovery of this principle led Morse to invent the telegraph, and, in 1844, he embodied his invention in a working telegraph from Washington to Baltimore. In his application for a patent he made many claims, but the eighth claim was the most important — the use of an electric current for making intelligible signs at any distance. This claim was held to be void.

A person, therefore, cannot patent a principle, but only a process or mode of applying the principle. The difference may be illustrated by describing one or two inventions. A long time ago it was ascertained

[1] Walker on Patents, p. 11.

that cast iron when cooled suddenly is very hard and also very brittle. On the other hand, when cooling slowly it is soft and tough. In making a car wheel it was desirable to form, if possible, a very hard periphery to endure a great strain, and a very tough centre. An invention appeared combining both ideas, a very hard rolling surface with a soft centre. It was ascertained that, in suddenly cooling the outside of the wheel, it contracted more rapidly than the parts that cooled slowly; and that, consequently, the wheel was very weak. About fifty years ago an inventor, Whitney, invented a mode of casting a wheel that combined both ideas perfectly. The Supreme Court declared that his invention of the process of making such a wheel was valid, and, therefore, patentable.

One of the most familiar illustrations is the Bell telephone patent, a process for applying laws known before, but applied by Bell in a peculiar manner.

There is a clear distinction between Morse's eighth claim and the claims of Whitney and Bell. Morse sought to obtain a patent for a single principle; the other inventors for a process or mode of applying a principle.

6. A patent for a process is a patent for a continuation of all the laws of nature utilised by that process.

A patent for a principle is a patent for one only of the laws of nature used in the process. "If a patent," says Walker, "for a principle were granted and sustained, it would be much broader

than a patent for a process, because it would cover all processes which aim at the same result and which must use the particular law of nature covered by the patent for a principle, no matter in what combination with other laws. A patent for a process, on the other hand, covers only its own method of using all the laws of nature which it utilises. To grant and sustain a patent for a principle would induce an inventor to guess which of the laws of nature used in his process will always be found indispensable, and guessing rightly, would enable him, by claiming that particular law to suppress all particular processes using it. . . . A patent for a process, on the contrary, leaves the field open to ingenious men to invent and use other processes using part of the laws used by the patented process, or using all of them in other combinations and methods.[1]

7. Machines and their improvements constitute the majority of American patents.

(*a*) A machine is a combination of improved mechanical parts adapted to receive motion and to apply it in producing some mechanical result. The parts of the machine may be old while the machine as a whole and also the subdivisions are proper subjects of a patent.

(*b*) An improvement may consist in an addition or a subtraction, or in substituting, for one or more of its parts, something different, or in so rearranging its parts as to make it work better than before. Whether or not a given improvement is patentable

[1] Walker, § 14, p. 10.

will depend on several considerations. First of all it must be distinguished from an improvement in mere mechanical skill of construction. Again, it must not be an infringement on some other invention.

(*c*) The word manufacture includes everything made by the hand of man and also processes of manufacture.

8. The phrase, "composition of matter," covers all compositions of two or more substances. It includes, therefore, all composite articles resulting from chemical union or from mechanical mixture, whether gases, fluids, powders or solids.[1] To be a proper subject of a patent a composition of matter, like a process, a machine, or a manufacture, must be invented. It must also be novel and useful. These matters will be considered hereafter.

9. The distinction between a machine and a manufacture is not always clear, and the same thing may be said concerning a manufacture and a composition of matter. But an inventor whose invention belongs to one of these three classes is entitled to a patent.

10. The law provides that any person who, by his own industry, genius, and expense, has invented and produced any new and original design for the printing of woolen, silk, cotton or other fabrics, any new and original impression, ornament, pattern, print, or picture to be printed, cast or otherwise placed on or worked into any article of manufacture, or any new, useful, and original shape or configuration

[1] Walker, § 18, p. 13.

of any article of manufacture, may obtain a patent therefor.

The law thus recognises the fact that some designs are useful as well as ornamental, while others have no utility except to please the eye of the beholder. It is questionable whether the framers of the Constitution intended to provide patents for designs which are useful only because they are ornamental. In our age beauty is generally believed to have utility of its own, and patents are, therefore, granted, and sustained for designs which are useful only because they are beautiful.

11. A distinction must be made between the invention of something of considerable importance and a slight development in a process of manufacture, etc. Justice Bradley has developed this idea with great clearness. He says that, in the development of manufactures, there is a constant demand for new appliances which the skill of ordinary workmen and engineers are adequate to devise. Each step in advance prepares the way for something more. If, to each slight advance, a patent was given, the consequences would be injurious to all. The design of the patent laws, he remarks, is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favour. It is not the object of these laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled machinist

or operator in the ordinary process of manufacture. Were exclusive privileges granted for every little thing a pack of speculative schemers would arise and watch every advancing wave of improvement and gather its foam in the form of patented monopolies. Were they permitted to do this they would, in fact, lay a heavy tax on the industries of the country without contributing anything to its real advancement.

12. To distinguish between patentable manufactures and minor ones that are not, is not always easy. In some cases the discovered invention seems very slight, yet is very important, and, therefore, is patentable; in other cases, the invention is less important and not within the law. An interesting case may be given — that of a carbon filament invented by Edison. The filaments used before Edison invented them had a diameter of one-thirty-second of an inch. Edison invented a carbon having a diameter of one-sixty-fourth of an inch. This seems a trifling thing, but the consequences were revolutionary. By the old filament, though lighting was possible, it was hardly practical. By the reduction of the diameter of the filament half the cost of lighting was saved. In other words, the invention of Edison, as an eminent writer has said, lies at the foundation of the incandescent electric lighting of the world. This invention, slight as it seemed in one sense, was clearly patentable.

Another illustration may be given — that of articles used to fill wood in order to give a solid surface. Formerly silicious clays were used, and someone

ascertained that the use of powdered fine quartz or feldspar, mixed with oil, wrought greatly improved results. The opponents to this patent claimed that they were merely substitutes. The courts held otherwise, declaring that the use of these substances resulted in very different and greatly improved effects, and that their inventor was entitled to legal protection.

While it is not easy always to distinguish between a new thing that is important and patentable and something else also new, but less important because it may be the common knowledge of other persons, yet there are many negative rules for determining what is not patentable. One of these has already been foreshadowed, namely, that the products of mere mechanical skill cannot be secured by invention for the same reason that excellency of workmanship is no invention, and, therefore, not entitled to a patent.

13. Again, the invention of substituting superior for other materials, in making one or more or all of the parts of a thing, is not an invention within the meaning of the law. The courts hold that an improvement must be the result of judgment and skill in the selection and adaptation of materials, and not merely the product of the inventive faculties of those who made them. So there is no invention in substituting superior for inferior materials. There is none in selecting from a number of materials the one best adapted to the purpose in view, and none in substituting one well-known form of a particular material for another well-known form of the same material. It is not an invention to improve a known structure

by substituting a new equivalent for any of its parts.

14. It is not an invention to enlarge or strengthen a machine so that it will operate on larger materials than before. Nor is it an invention to change the degree of a thing or one feature of a thing. There have been numerous cases in which patents have been sought for changes or substitutions of one thing for another. Many of these have failed because they have not possessed the degree of inventiveness required by the law.

15. Aggregation is not invention. It is no invention to duplicate one or more parts of a machine unless that duplication causes a new mode of operating the duplicated parts.

16. It is not invention to omit one or more parts of an existing thing, unless that omission causes a new mode of operating the parts retained.

17. It is not invention to combine old devices into a new article without producing any new mode of operation.

18. Want of invention, if it already exists in a particular process or thing, can nearly always be detected by one or more of these rules. When a case arises to which none of them applies, and an uncertainty still remains, this may, perhaps, be removed by means of a rule lately prescribed by the highest federal tribunal. When the other facts in the case leave the invention in doubt, the fact that the device has gone into general use and is displacing other devices which had previously been

employed for analogous uses is sufficient to turn the scale in favour of the existence of invention. The fact, however, that the device has been forced into extensive sale by judicious advertising and business energy is not proof of the superiority of invention.[1]

19. To change the form of a machine or manufacture is sometimes invention and sometimes not. When a change of form is within the domain of mere construction it is not invention; when it involves a change of mode of operation or function or results it is invention, unless this is held to be otherwise in pursuance of some other rule.

20. To change the proportions of a machine or manufacture will seldom or never amount to invention but it may be invention to change the proportion of the ingredients of a chemical combination or of other compositions of matter.

21. Every inventor is presumed to have borrowed whatever he produces that was first actually invented and used in the United States, or was previously patented or described in a printed publication in any country.

22. It is not settled whether such an inquiry into the state of an art can include any foreign patent previously issued on an application of the invention covered by his later United States patent to make it true that that invention was first patented or caused to be patented in a foreign country.

23. Another element of patentability is novelty. Novelty is the name for newness, but that name

[1] Smith v. Dental Vulcanite Co., 93 U. S., 495.

does not indicate the foundation of the thing which it denotes. One of the ways of ascertaining novelty is to prove it from the negative side.

Novelty is not lacking by reason of prior knowledge and prior use in a foreign country, provided the patentee believed himself to be the first inventor, and provided, also, that the thing had not been patented elsewhere or described in a printed publication.

Novelty is not lacking by reason of the issue of any United States patent after the patented invention was made, though application for it was made before that event, nor by any private or prior patent granted in any foreign country, nor by any public patent granted in England unless it was sealed before the person obtaining the American patent made the invention.

Novelty is not lacking by reason of any prior or printed publication unless the information was full and precise enough to enable any person skilled in the art to which it relates to make the process or thing covered by the patent sought to be anticipated.

Novelty is not lacking by reason of any prior abandoned application for a patent. This furnishes no evidence that any specimen of the thing described was ever made or used anywhere.

But evidence that the person who made an abandoned application also intended to carry his invention into practical use may be admitted to aid the court to determine the date and nature of the invention which the applicant sought to put into a working

form. If it appears that his invention outside his abandoned application did not amount to enough to negative the novelty of the subsequent patent to a later inventor, then that abandoned application becomes immaterial.

Novelty is not lacking by reason of any successful application for a patent, or by any document pertaining thereto, other than the letters patent issued in pursuance of the same. When such an applicant has offered to prove the existence of something which is not shown by the letters patent themselves, the justice and propriety of the rule are apparent.

Novelty is not lacking by reason of any prior unpublished drawings, no matter how completely they may exhibit the patented invention. The same thing may be said of any patented model, no matter how it may coincide with the thing covered by the patent. Walker says: "The reason of this rule is not stated with fulness in either of the cases which support it, but that reason is deducible from the statute and from the nature of drawings and models." [1]

Novelty is not lacking by anything not satisfactorily identical with the subject of the patent, even though the function of the prior thing was identical with the patented article.

Novelty of any design is not negatived by the fact that all of its features can be collected out of scattered prior designs.

Novelty is not negatived by anything incapable

[1] Patents § 60, p. 56.

of the function of the thing covered by the patent, even though the character of the prior thing was chemically identical with the patented thing or mechanically similar to it.

Novelty is not negatived by the fact that every part of the patented thing is old. This rule springs from the doctrine which allows patents for new combinations of old devices. The whole is different from the sum of all its parts. If, however, a new assembling of old things amounts only to aggregation and not to combination—in other words, results in no new mode of operation — the patent will be void for want of invention, though not void for want of novelty.

Novelty is not negatived by any prior accidental production of the same thing without any knowledge on the part of the producer that has enabled him to repeat that production.

Novelty is not negatived by anything which was invented, patented or described in a printed publication prior to the granting of the patent in question or even prior to the application for the same.

Novelty is not negatived by anything which was neither designed, nor apparently adapted, nor actually used, to perform the function of the thing covered by a patent, though it might have been made to perform that function by means not substantially different from that of the patented thing.

Novelty is lacking whenever there was prior knowledge by even a single person of use in this country of the thing patented. This rule applies even

to cases where that knowledge of use was purposely kept secret, and it applies, no matter how limited that use may have been.

Novelty is also lacking whenever there is evidence that even one specimen of the thing patented was made in this country prior to its invention by the patentee. This rule results through statute which provides that things, in order to be patentable, must not have been known or used by others in this country.

Novelty is lacking by proof of prior use where the invention was understood in point of method though not correctly understood in point of result.

24. The question of the novelty of a design is to be determined by its comparative appearance in the eyes of average observers, and not in the eyes of experts making an analytical inspection.

25. Questions of novelty are questions of fact; therefore, to determine them an investigation is necessary, which is conducted in the same manner, as all other investigations of a similar character.

26. The burden of proof of a want of novelty rests on him who avers it, and every reasonable doubt should be resolved against him. Novelty is lacking only by proof which puts the fact beyond doubt.

27. The subject of the patent must possess something more than invention and novelty; the subject must be useful. Utility is absent from all processes and devices that cannot be used to perform their specific functions, and patents for them are void. An illustration may be given. A patent covered

the cylinder of a threshing machine that had rows of teeth inserted in its convex surface which revolved within a barrel having no teeth. The contrivance, therefore, was useless; nevertheless, a patent was granted. The patentee or some other person, by simply inserting rows of teeth in the outside surface of the barrel produced the useful threshing machine, which, superseding the ancient flail, is one of the most important of all agricultural machines. In such cases, says Chancellor Walworth, the patent is void if the machine will not answer the purpose for which it was intended without some additional alteration which the mechanic who is to construct it must introduce of his own invention, and which had not been indicated, or disclosed by the patentee at the time his patent was issued.[1]

If a device performs a good function, though but imperfectly, its utility is not negatived by the fact that it can be improved and made to operate better. Nor is its utility negatived by later superior inventions that have superseded the use of it. Indeed, patents are never held void for want of utility merely because they do their work poorly. In such cases no harm results to the public from the exclusive right, because few will use the invention.

Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is to be attached. In this case utility resides in beauty. Whatever is beautiful in the eye of the patent law

[1] Burrall v. Jewett, 2 Paige, 143.

is useful, because beauty gives pleasure, and pleasure is the ultimate object of use in many things.

Utility is negatived if the function performed by the invention is injurious to morals, health, or the good order of society. An invention to improve the art of forgery, or to spread contagious disease, or to contaminate water, would be unpatentable.

Utility is negatived by the fact that the patented process or thing is injurious to the thing to which it is applicable, and also that the function performed by the patented part of the machine, though good in itself, is injurious to the utility of the machine as a whole.

28. An inventor may abandon an unsuccessful endeavour to make an invention; or, having made it, may abandon it to the public; or, having made an invention and applied for a patent, may abandon that application without abandoning the invention. Transactions of the first kind are called unsuccessful abandoned experiments. They confer no rights on those who make them and affect no rights of other persons.

Abandonment of an invention may be actual or constructive. It is actual when resulting from intention. That abandonment is constructive which is the result of some statute, regardless of the inventor's intention.

Actual abandonment occurs when there is an entire giving up of all intention of securing a patent. Such relinquishment may be shown by direct or other evidence. Of course, an inventor abandons

his invention to the public when he makes an express declaration to that effect.

29. An invention is a question of fact, and not of law. In applying this rule patents are not held void for want of invention unless it is clearly absent.

30. Every machine, before it can be used, must be constructed as well as invented. If one man does all the inventing and another all the constructing, the first is the sole inventor. If both participate in the inventing they are joint inventors regardless of the fact that both took part in the constructing.

31. To constitute a man an inventor he need not have skill enough to embody his invention in a working machine, model, or drawing. If he furnishes all the ideas needed to produce the invention he may avail himself of the mechanial skill of others to embody or represent his contrivance, and still be the sole inventor; but it is no invention to conceive a result and employ another to produce that result.

32. An application consists in doing several things: Depositing in the Patent Office a written petition to the Commissioner of Patents, and also written specifications of the invention with an oath to them; paying the Patent Office fee, in some cases; depositing a drawing; in others, a model; in others, specimens.

33. The petition is signed by the applicant and addressed to the Commissioner of Patents, stating the petitioner's name and residence, and requesting the grant of the patent for the invention therein designated. The petition must be signed by the inventor himself, and not by an assignee, though

he may properly request that the patent be issued to an assignee. An inventor who becomes insane, or dies before signing his petition, may act by his guardian in the one case, and by his executor or administrator in the other.

34. The specification consists of seven parts: The preamble; the general statement of the thing and object of the invention; a brief description of the drawings; a detailed description of the invention; the claim or claims put forth by the inventor; his signature; the signatures also of two witnesses.

The preamble states the name and residence of the inventor and the title of the invention, in order to connect the specifications with the petition.

The general statement of the nature and object is a mode of introducing the more elaborate description. The description of the drawings is a convenience in understanding them.

The detailed description of the invention must be full enough to enable any person skilled in the art or science to which the invention appertains to make or use it. If it be a machine, manufacture or compound, the description is ineffective unless it meets this requirement, and the patent, if granted, will be void.

The statute also says, in the case of a machine, that an applicant shall explain the principle and the best mode in which he has undertaken to apply that principle so as to distinguish it from other inventions. The object of this is to identify the invention.

The law does not mean that the inventor must

explain the law of nature whereby his machine works, for, if it did, neither Morse nor Bell could have complied with the requirement in describing the telegraph or telephone. The provision means that the essential characteristics of the machine shall be explained, and that the inventor shall state the mode which he regards to be the best.

35. The claim or claims must necessarily form a part of every specification. The statute says that "the applicant shall particularly point out and distinctly claim the part, improvement, or contribution which he claims as his invention or discovery." Says Walker: "The practice of the Patent Office has always been to require the claim or claims to be made in that particular part of the specification which immediately precedes the signatures. It is the practice of many solicitors of patents to write claims in vague phraseology, with the idea that vagueness is elasticity and elasticity is excellence. Such a practice is neither honest nor expedient. It is not honest, because it is sometimes intended, and always adapted, to defraud the public and to lead individuals into unintended infringements. It is not expedient, because dishonesty is bad policy in matters of patents and because vagueness of claims may make void a patent which would otherwise be valid."

An applicant whose description sets forth an entire machine may lawfully make a claim co-extensive with the description if the machine, as a whole, possesses novelty. Such a claim ought rarely to be the

only one in a patent, because it can, in most cases, be readily evaded; the proper practice is to fix on the new parts or new combinations, and to make a separate claim for each of these parts and combinations. If the applicant desires he can apply for and receive a separate patent for each of these parts and combinations.

A part of a machine claimed alone may be specified by the use of its name, when no other part of the machine has a similar name; but when the use of the name alone is not sufficiently specific to show what part of the machine is intended, that object can be accomplished by naming in the claim a reference letter or numeral to indicate that part in the description and in the drawings.

To a description that sets forth a manufacture there ought to be a separate claim for each of its patentable features. For, if there is but one claim covering all its features, those persons who infringe even the least of these incur a liability for making, using, or selling articles which contain all the others.

In a description relating to a composition of matter the claim should cover that composition in its entirety, and should, either expressly or by reference to the description, specify the different proportions the ingredients bear to each other. When some of the described ingredients may be left out the applicant, if he states that fact in the description, may have a separate claim for the composition of matter composed only of the residue, or he may have a single

claim covering the indispensable ingredient whether with or without the others.

In a description relating to a process the claim should cover all the necessary occurrences in that process, and cover no more. If it covers less it will be void for want of utility; if it covers more it can be evaded by persons who omit any one if not necessary in using the others.

"Where the description and its accompanying drawing or photograph represent a design, the claim may identify its subject by a reference to that drawing or photograph. . . . A design-patent may contain a claim for an entire design with other claims for such of the parts of the design as are independently patentable. But several unconnected ornaments cannot lawfully be aggregated and claimed together in one claim."[1]

36. The signature of the applicant and of the witnesses must be in full and legibly written. The oath need not be in writing nor recorded, and the recital in the letters patent that the required oath was made to the application, is conclusive evidence of the fact.

37. The oath to an application made by an executor or administrator of a deceased inventor may be so varied from the ordinary form as to meet his case; whether it is needful for him to swear that he believes the deceased inventor to be the first inventor, or believes that he was, in fact, the first inventor of the invention, is an unsettled question. If the

[1] Walker, § 120a, p. 104.

first view be correct then an executor may, without perjuring himself, obtain a patent for an invention which he may know has been in previous use. If the second view be correct then he is cut off from such a practice.

38. The fee on applying for a patent for a process, machine, or manufacture, is $15, and there is a final fee of $20, payable after the patent is allowed and before its issue. The fees for patenting designs vary with the length of the terms for which the patents are sought. For a term of three and a half years the fee is $10; for a period twice as long $15; for fourteen years $30; and the fees for design patents must be paid in advance. The final fees above mentioned must be paid within six months after allowance of the patent; a notice thereof is sent to the applicant or his agent; and if it is not paid within that time the patent is withheld.

39. Drawings are required to be furnished by the applicants for patents in all cases in which an invention may be thus illustrated. They must also be signed by the applicant and attested by two witnesses. The drawings must also show every feature of the invention covered by the claims. An invention consisting of the improvement of an old machine must show, in one or more views, the invention itself disconnected from the old structure, and also another view with so much only of the old structure as will show the connection of the invention with the same.

All drawings for letters patent must show the true

position and proportion of the parts of the invention they purport to delineate; but they need not be accurate enough to be used as working drawings from which to construct specimens of these inventions.

40. A model of the invention must be furnished by the applicant in all cases admitting of such a representation, provided the Commissioner requires a model. Under the operation of the law of 1870, models are at present required by the Commissioner in very few cases which admit of representation in this manner.

41. Specimens of composition of matter and the ingredients are required by statute for such compositions in all cases whenever the Commissioner calls for them. In fact, he always does call for at least a specimen of the composition, put up in proper form to be preserved, unless that composition is in its nature perishable.

42. An application for a patent dates from its filing in the Patent Office, and not from the date of its execution by the applicant. When an application is divided by filing a new one for a part of the old subject, the new one will date from the date of the old one. In the absence of other evidence, the date of an application for a particular patent is taken to be identical with the date of the letters patent itself.[1]

On granting several patents to one inventor for different inventions in the same art, the dates of their application, instead of the dates of the inventions

[1] Walker, § 129, p. 110.

themselves, determine their relative merits. In order to apply this rule, the date, if the invention covered by the patent is sought to be anticipated, must be fixed.

No invention ought to date from any day wherein it had no existence outside the mind of the inventor no matter how complete may have been his mental conception of its character and mode of operation. Says Walker: "Mental conceptions are not useful inventions until they are so embodied that the world can use them after the death of the persons who conceived them. To allow inventions to take date from mental conceptions would strongly tempt inventors to commit perjury in order to appear to anticipate real anticipations of their patents." [1]

"Whether an oral description, given by an inventor to another, of a subsequently patented invention can give that invention a date earlier than that to which it would otherwise be entitled, depends upon the nature of the invention and the capacity of the hearer to understand it and remember it." [2]

43. After making an application it is the Commissioner's duty to cause an examination to be made of the applicant's invention; and, if it appears that he is justly entitled to a patent, it is the Commissioner's duty to issue it. This examination may be made by an assistant designated for that purpose, the Commissioner having the right to overrule his decision.

The examination may extend to the knowledge of

[1] § 70 p. 65.
[2] Ibid.

the invention and to any other question of fact on which the validity of the patent depends. Should an investigation of this question require the taking of testimony by the Commissioner, this must be taken in the form of depositions on notice to the applicant to appear and cross-examine the persons who are to testify.

While an application is pending the Commissioner has no authority to furnish a copy of any paper pertaining to it, except to the applicant or his attorney or agent. No patent official has any authority to give to any person information about a pending application, save to a very limited extent as prescribed by the rules of the Patent Office.

44. After rejecting an application for a patent it is the Commissioner's duty to notify the applicant, giving him the reasons for his action, together with such information as may be useful in judging of the propriety of amending his application, or altering his specification. If, after receiving such notice, the applicant persists in his request for a patent, with or without altering his specification, it becomes the Commissioner's duty to make a re-examination.

45. If the application is again rejected by the primary examiner the applicant may appeal to the Board of Examiners-in-Chief, and, if unsuccessful before them, may appeal to the Commissioner. The appeal may be heard by him, or by his assistants. If heard by the latter there is no appeal to the former, and no decision can be reopened or set aside by any successor, except for fraud, clerical error apparent

on the face of the record, or newly discovered evidence presented under circumstances that would justify a new trial in an action at law. If the Commissioner or assistant commissioner refuse to grant him a patent the applicant may appeal to the Court of Appeals of the District of Columbia; and, if the Commissioner refuses to allow that appeal, he may be compelled to do so by a writ of mandamus, so called, granted by that court on the applicant's petition. All appeals must be heard on the case as submitted to the primary examiner. No appeal, therefore, should be taken until the application is in such a condition that the patent will issue if the decision of the primary examiner be reversed. If that decision is reversed by the Board of Examiners-in-Chief the primary examiner must pass the case for issue. If the Board affirms the primary examiner's decision the Commissioner will not reverse the Board on any question of fact, unless its decision was clearly against the weight of evidence. If the Commissioner affirms the decision of the Board he need assign but one reason for that opinion; the applicant cannot demand of him that he pass upon any other question. The Commissioner may, at any time before the issue of the patent, reverse his own or any other favourable patent office action thereon, except that of his predecessor, or of the preceding assistant commissioner.

46. Any party aggrieved by the Commissioner's decision in any interference case may appeal to the Court of Appeals of the District of Columbia.

When an appeal is taken to the Court of Appeals

the applicant is required to give notice to the Commissioner, and to file, in the Patent Office within such time as the Commissioner shall appoint, his specific reasons for appealing.

The Court of Appeals, therefore, is the final tribunal in all these cases. Often elaborate hearings are had before that body to determine the validity of applications.

47. The right to amend an application for a patent is one of great value. It is not expressly established by statute, though frequently exercised. The applicant may amend before or after the first rejection of his patent, and he may amend as often as the examiner presents any new reasons for rejection.

SUBDIVISION 2. COPYRIGHT AND TRADE-MARK

1. The right to copyright.
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1. Associated with patents is the law of copyright. The National Government secures to the writer or author his ideas as well as his inventions. Says Justice Yates in an old case. "Ideas are free, but, while the author confines them to his study, they are like birds in a cage which none but he can have a right to let fly. For, till he thinks proper to emancipate them, they are under his dominion." Every man has a right to his own sentiments. He has certainly a right to decide, if he will, to make them public, or to use them only in the sight of his friends. In that sense a manuscript is peculiar property, and no man can take it from him and use it himself without violating the great law of property. And, as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication. Whoever, there-

fore, deprives him of that priority is guilty of manifest wrong.

2. The most important sections of the law of copyright are contained in the footnote below.[1] This describes the mode of procuring copyrights, of assigning them, what are infringements, etc.

Within ten days after publishing a book, the proprietor of every copyright must mail two copies to the Librarian of Congress, at Washington. Failing to do this, a penalty may be imposed on him for neglecting the legal requirement. But the validity of a copyright is not affected by the failure of the proprietor to deliver the copies.

3. What is meant by publication? This would seem to be a simple question, but the law is full of difficulties, unseen on the surface. The delivery of a lecture to an audience is not a publication; nor

[1] Rev. Stat., § 4952: "Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatise or to translate their own works."

§ 4953: "Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

§ 4954: "The author, inventor, or designer, if he be still living, and a citizen of the United States or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work, or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published, in one or more newspapers, printed in the United States, for the space of four weeks."

§ 4956: "No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress or deposit in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design for a work

is a book with a title-page containing the statement, "printed, not published," or "printed only for private circulation." In practice a book that is advertised is supposed to be published, for it is then offered to the public for a price. To give away a few copies is not a publication, and does not invalidate a copyright. To act or represent a play will not avoid a subsequent copyright.

4. A book means every volume or part of a volume, pamphlet, sheet of letter-press, or of music, or a map, chapter, or plan, separately published. If the work contains several volumes the insertion of the copyright in the first volume following the title-page is sufficient. But a newspaper price-current or label of an article offered for sale cannot be copyrighted.

5. Who is an author? Professor Parsons says: "If he uses only old materials in an old way, if he

of the fine arts, for which he desires a copyright nor unless he shall also, within ten days from the publication thereof, addressed to the Librarian of Congress, at Washington, District of Columbia, deliver at the office of the Librarian of Congress or deposit in the mail two copies of such copyright book or other article; or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same."

§ 4057: "The Librarian of Congress shall record the name of such copyright book or other article, forthwith, in a book to be kept for that purpose, in the words following: 'Library of Congress, to wit: Be it remembered that on the — day of — Anno Domini, A. B., of ——, hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit (here insert the title or description): the right whereof he claims as author (originator, or proprietor, as the case may be), in conformity with the Laws of the United States respecting copyrights. C. D., Librarian of Congress.' And he shall give a copy of the title or description, under the seal of the Librarian of Congress, to the proprietor whenever he shall require it."

§ 4062: "No person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of Congress in the year ——, by A. B., in the office of the Librarian of Congress, at Washington.'"

fills his books from other books without the addition of anything new from his own mind, he certainly is not an author. One may make a scrap-book by pasting on the blank leaves of a book interesting articles cut from newspapers, and such volumes might, if printed, have a certain attractiveness and value, but it would not be easy to regard the maker as an author, and yet a mere commonplace book, like Southey's, for example, consisting solely of extracts, might be entitled to copyright on the ground of the care and labour or skill which had made so valuable a collection.'' The plan or system of a book, the classification and arrangement of topics may be so unique or important as to render it worthy of the protection of a copyright. Letters may be copyrighted, but an immoral, blasphemous, infamous, or otherwise illegal work is not entitled to a copyright. The English cases go further than our own in denying copyrights to works of this character. An artist employed by the Government on an exploring expedition, knowing that all his tracings were to be its property, had no copyright in them.

6. A copyright may be partly or wholly assigned. It should be recorded in the office of the Librarian of Congress, otherwise it will not be valid against a person who subsequently purchases without notice. An assignment of a copyright for a limited locality operates as a mere license. An author may assign his unpublished manuscript, and thus give to the assignee the exclusive right to take out a copyright. This may be done orally. In one of the cases a person

agreed to furnish gratuitously notes and comments for a new edition of a copyright book; and the right to copyright this edition with the notes and comments, vested immediately in the owners of the original work.

7. Does a general assignment of a copyright include the right to the extension of fourteen years provided by the law? The better opinion is, the extension is not included in the assignment, but belongs to the original party; if, however, the instrument clearly shows that it was the intention of the assignor to transfer the right to any extension that might be granted, and he refuses to do so, he may be compelled by a court of equity.

8. An infringement may next be considered. It is difficult to lay down a general rule on this subject. Plagiarism is one thing; piracy another. Professor Parsons says: "Every writer must be permitted to use sentiments, descriptions, definitions or expressions which, in their very nature, are common property, and therefore not subject to any exclusive right; and mere imitation is pardonable because, in a matter of copyright, as of patent, resemblance is not the question, but identity. And, on the other hand, every author is entitled to the fruits which the law permits him to reap from the fields which he has cultivated." [1]

9. An author's right is infringed only when other persons produce a satisfactory copy of the whole, or a material part of the book, or other thing covered

[1] Vol. II., p. 330, Eighth Edition.

by the copyright. A smaller production in a book of nine cartoons from *Punch*, with or without the descriptive writing, was held to be an appropriation of the substantial part of the proprietors' sheets of letter-press and an infringement of their copyright.

10. Rarely is a work reprinted without change, and an honest quotation from a book is not an infringement. If a book infringes the copyright of another book in a distinct particular, the remedy will not extend beyond the injury. Neither the intention of the party charged with the infringement, nor his ignorance of infringing, affects the matter. A translation may be infringed like an original book.

11. A compilation is not an infringement when it contains so much of original thought on the part of the compiler as to make his book essentially a new production. The answer is similar concerning an abridgement of a copyright book. Mr. Curtis, in his work on copyright, concludes that any abridgement whatever must be an infringement. Parsons says this is going too far. "Has the later author only made use of thoughts, or facts which the earlier author gave to the public in such wise as to produce by his own original efforts, a new book of his own?" This is the test that must be applied to such cases.

12. The remedy for infringing a copyright is generally an injunction. To be effective it must be perpetual. Usually the petitioner prays for an immediate injunction. This may be granted temporarily or be refused. In no case is a permanent

injunction granted until after a full hearing on the merits of the complaint.

13. Passing to the subject of trade-marks, this is full of extremely difficult questions concerning their nature and the protection to which they are entitled. The more important part of the statute pertaining to the subject is given in a note.[1]

[1] The act of July 8, 1870, provides: Sec. 4037. Any person or firm domiciled in the United States and any corporation created by the authority of the United States, or of any state or territory thereof, and any person, firm or corporation resident of or located in any foreign country which by treaty or convention affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements:

First. — By causing to be recorded in the Patent Office a statement specifying the names of the parties, and their residence and place of business, who desire the protection of the trade-mark; the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated; a description of the trade-mark itself, with facsimiles thereof, showing the mode in which it has been or is intended to be applied and used; and the length of time, if any, during which the trade-mark has been in use.

Second. — By making payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

Third. — By complying with such regulations as may be prescribed by the Commissioner of Patents.

Sec. 4038. The certificate prescribed by the preceding section must, in order to create any right whatever in favour of the party filing it, be accompanied by a written declaration by the person, or by some member of the firm or officer of the corporation by whom it is filed, to the effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm, or corporation has the right to use such, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; and that the description and facsimiles presented for record are true copies of the trade-mark sought to be protected.

Sec. 4040. The time of receipt of any trade-mark at the Patent Office for registration shall be noted and recorded. Copies of the trade-mark and of the date of the receipt thereof, and of the statement filed therewith, under the seal of the Patent Office, certified by the Commissioner, shall be evidence in any suit in which such trade-mark shall be brought in controversy.

Sec. 4041. A trade-mark registered as above prescribed shall remain in force for thirty years from the date of such registration; except in cases where such trade-mark is claimed for and applied to articles not manufactured in this country and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this act at the same time that it becomes of no effect elsewhere. Such trade-mark during the period that it remains in force shall entitle the person, firm, or corporation registering the same to the exclusive use thereof so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it as to be calculated to deceive, upon substantially the same description

14. A trade-mark may be defined as the name or device used by a seller of goods to indicate that they are made by him, and that he has an exclusive right to sell them. His object in securing a trade-mark is to acquire the profits arising from the sale of the goods thus bearing a peculiar mark.

15. A trade-mark may be any device or symbol adopted by the owner. The essential thing is, its use to designate the true origin and ownership of the article to which it is affixed. It need not indicate any particular person as the maker of the article. Numerals may be thus arbitrarily used in combination with other devices. Also, the name of a place — as Akron cement — or pictures, symbols, or simply a word or words. Thus the word, "Bethesda" applied to a spring, to indicate its origin and ownership, was held a valid trade-mark and entitled to protection.

16. The legal test of a trade-mark must always be, did the trade-mark itself ascribe the manufacture to him who used the mark. Perhaps the trade-mark would do this, perhaps this result might come from general knowledge through time. The safest

of goods. And at any time during the six months prior to the expiration of the term of thirty years, application may be made for renewal of such registration, under regulations to be prescribed by the Commissioner of Patents. The fee for such renewal shall be the same as for the original registration; and a certificate of such renewal shall be issued in the same manner as for the original registration; and such trade-mark shall remain in force for a further term of thirty years.

Sec. 4942. Any person who shall reproduce, counterfeit, copy or imitate any recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use.

course, so an eminent authority says, is to follow the custom which is now nearly, if not quite, universal — i. e., to connect with the mark a name or designation which should connect the thing bearing the mark with the name of him who uses it.

17. The exclusive right secured by a patent or copyright is regarded in law as property. As the same statute includes trade-marks, they also are property.

18. Aliens who "are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States," are protected quite as effectually as our own citizens. By a recent statute the right is somewhat restricted — i. e., to countries affording similar priviliges to citizens of the United States.

19. A trade-mark is essentially the right of the manufacturer only. From authority and practice, therefore, a seller can possess this right only from the manufacturer. If a glove manufacturer, for example, in Paris, has acquired an extensive reputation, and arranges for a merchant in New York to sell his gloves, he may have the right to call himself the exclusive importer. But this action would not prevent any person who could get these goods in Europe from bringing them here and selling them as the gloves of the manufacturer. But he would have no right to assume that he had an arrangement with the manufacturer, and was, therefore, his exclusive agent or representative in this country.

20. Questions sometimes arise concerning the

degree of novelty required for a valid trade-mark. If the name has been long and commonly used to designate certain articles, no one could now claim an exclusive right to this name by making it his trade-mark. Parsons says the requirement of absolute novelty in a name or mark has not been pushed, and will not be so far as the needed novelty of a patented invention.

21. No man will be protected in the use of his trade-mark unless it be an honest mark and has been used honestly. Sometimes a man falsely inserts in his trade-mark the word "patent." This is a legal offense.[1]

22. The statute provides that a trade-mark when duly recorded shall remain in force for thirty years, and may be extended on application for a similar period. It therefore contemplates the continuing of the mark beyond the life of the original proprietor.

23. Who shall succeed him? On this point the statute is silent. Should he have a son bearing his name, can he affix the trade-mark? It would be safer for him to record the trade-mark anew as his own. If the right was inherited it would go to all the heirs and next of kin, and be shared among them without reference to the question whether they made the article or not.

In one of the cases M had a recipe for a liniment, and gave it to the members of his family, permitting each to make and sell it with a label attached furnished

[1] For the protection it gives to the owner, see Section 2, Subdivision 8 § 10.

by himself containing the words: "Old Dr. M's Celebrated Liniment" and other descriptive words, a vignette and the maker's address. Each member, including himself, confined his sales to a particular territory. After M's death his widow continued to make and sell on M's territory, using the same label. After a time she sold her material and outfit to one of M's sons. It was held that he had no right as against her other children, or the public generally, to make the liniment and use the label or M's name and description of the article.

24. A trade-mark may be assigned. The Commissioner of Patents is authorised to make rules and regulations for its transfer. Not only may the seller agree that the buyer shall use the recognised trade-mark, but he may go further and agree not to use it himself.

Parsons says that trade-marks may be divided into two classes for the purpose of determining whether they may be transferred. The first is where the trade-mark declares that the article is made by a particular person or firm. This cannot be transferred. The second, where the mark is arbitrary or meaningless, and is only to indicate that the goods are made in a particular manner or possessing a particular excellence. This mark can be transferred.

25. The trade-mark may be infringed, it may be forged or imitated. The remedy in such cases is by injunction. But a court of equity will not restrain the use of a label on the ground of infringement unless the similitude is so great as to deceive purchasers

who are not cautious. It is not necessary to show that anyone has been actually misled; and evidence of one sale of the imitation will justify an injunction. If the imitation be so close in its most salient and obvious features that the differences are only in subordinate and less noticeable characteristics, the law is violated. In one case the imitation consisted in the use of one word only. The remainder of the original trade-mark was quite different from the imitation; nevertheless an injunction was granted.

26. Must the deception be intentional, and, therefore, fraudulent? One may make foods and affix to them a mark indicating a peculiar merit without intending to deceive anyone concerning their manufacture. If the deception be one in fact, though not in intention, the law will protect the rightful owner.

§ 2. By Contract

SUBDIVISION 1. INTRODUCTION

1. Definition.
2. Simple contracts and specialties.
3. Executory and executed contracts.
4. Express and implied contracts.

This is a very extensive subject; indeed, a large portion of the entire legal field might be covered by a complete statement of the law on this subject.

1. Let us begin with a definition. Chief Justice Marshall's has often been quoted: "A contract is an agreement to do, or not to do, a particular thing."

2. The most general division of contracts is into simple contracts and specialties. A specialty is in writing, to which a seal is added, after the name of each contracting party. A simple contract includes all kinds that are not thus sealed. They are often called parol contracts. In some cases the law requires the sealing of contracts, but more frequently contracts are either verbal or written without the addition of a seal. Formerly, when people could not write, much more attention was paid to the use of a seal than is paid at the present time. Nevertheless, there are some peculiarities relating to sealed contracts, especially in the way of evidence. For example, a cause or consideration for making a sealed contract need not be proved, because the law assumes that a consideration was given. A person who wishes to enforce or compel another to perform a verbal or unsealed contract must show that there was a consideration for making it.

3. Another division is into executed and executory contracts. The terms clearly express their meaning. An executed contract is finished, completed, like a paid note;[1] an executory contract is still incomplete, like a note that is still running.

4. Another division is into express and implied contracts. An express contract is actually made

[1] "One's first impressions of a contract fully executed on both sides is, that it is ended, and no questions concerning it remain. But on reflection we see that the rights, relations, and responsibilities of the parties are changed, in degrees and ways differing with the varying circumstances. For example, property has been acquired or lost, a new executory contract has been created by the law, creditors have been invested with new rights . . . so that, though the contract is, in a sense, ended, in another and most important sense, it remains." Bishop on Contracts, § 80, p. 33.

in words or in writing; an implied contract is made by the law and is founded on justice. Thus, if A asks B to go and work in his field, and B goes and labours, though not a word is said about compensation, the law implies that B must be reasonably rewarded. Implied contracts are created under a great variety of conditions, as we shall shortly learn.

SUBDIVISION 2. PARTIES

1. Who is a minor or infant.
2. Classification of minors' contracts.
3. Contracts of a minor for necessaries.
4. What are voidable contracts.
5. Effect of a promise to pay afterward.
6. If his contract is not avoided it remains in force.
7. Fraudulent contracts made by a minor.
8. He cannot bind himself when he has a parent or guardian.
9. He may, with his guardian's consent.
10. If he avoids his contract he can take no benefit from it.
11. Emancipation.
12. Contracts of married women.
13. Contracts of aliens.
14. Contracts of drunken persons.
15. Contracts of insane persons.

1. To every contract there are two or more parties, but not every person can be a legal party. Persons under twenty-one years of age cannot make them.

In law they are infants or minors; and infancy disables them from making contracts, except for things needful to sustain their lives and health — in other words, for necessaries. In most states, infancy ends at the age of twenty-one; in some of them women are regarded as of full age at eighteen. A person becomes of age at the beginning of the day before his twenty-first birthday. The reason, though not a very sound one, is that the law, except in cases imperatively required by justice, does not recognise parts of a day. A person, therefore, born on the ninth of May in the year 1900, will become of age at the beginning of the eighth of May, 1921. If he were born at the beginning of the ninth at the end of the eighth, twenty-one years afterward, he would have lived the full period of infancy. If he were born at the end of the ninth, as he became twenty-one at the beginning of the eighth, two days, in truth, would be lacking to complete the full infantile period.

2. The contracts of minors may be divided into two classes: contracts for necessaries, and for other things. The rule making the first class binding on them is established for their benefit and protection. The obligation, however, is rather implied by law than arising by express contract. Consequently, only a reasonable price can be recovered for anything sold to a minor, whatever may have been the price fixed by the parties.

3. It is not always easy to distinguish between the things that are strictly necessary and other things. First of all, a thing may be regarded as necessary

by one that would not be by another, depending on varying conditions of life. Usually, there has not been much difficulty in applying this rule of law. Necessaries include not only the things needful to support life, but such as are suitable to an infant's degree and estate; and the question, if disputed in a court of law, is a proper one for a jury to decide whether they were so or not, and whether they were furnished at reasonable prices. Cases are constantly arising in which minors seek to avoid their contracts, but, having had the benefit of them, are required by the law to fulfil them. Sometimes, when a minor's extravagance is clearly proved, and sellers must have known that his purchases were not needed, they have failed to collect their bills. One of these cases was decided long ago by Chief Justice Gibson.[1] The bill exceeded a thousand dollars, and included twelve coats, seventeen vests, and twenty-three pairs of trousers, within fifteen months and twenty-one days, besides five canes, fur caps, chip hats and other things. The judge remarked that such a bill made him shudder, and yet the jury decided that the merchant could recover almost the whole of the amount. The judge said there was no reason for regarding such things as necessaries, and that it was the merchant's duty to know that the supplies were unexceptionable in quantity and kind, and that they were actually needed. When, for the purpose of relieving the minor, he assumed the business of guardian, he was bound to execute the duty as a prudent guardian would do,

[1] Johnson v. Lines, 6 Watts & Serg., 80.

and, consequently, to make himself acquainted with the ward's necessities and circumstances.

4. Contracts for other things than necessaries are not absolutely void, but voidable. While they remain executory on the minor's part, he can disavow them at any time; after they have been fully executed he can disaffirm or ratify them as soon as he has attained his majority, or within a reasonable time afterward.

5. To ratify is not merely to acknowledge the contract. In some of the states a statute requires a new promise in writing and signed by the promiser, otherwise he is not liable.

The law does not require the use of any particular words or phrases for this purpose, but the description of the debt and the promise must be clear enough for the creditor to understand the promisor. It must also be made voluntarily and for the purpose of assuming a liability from which the adult knows that the law has relieved him. If the promise be conditional the condition must be proved before the promise can be enforced.

6. A minor's contract which is not avoided remains in force. What is the effect of remaining silent? As a general rule, mere silence is not a confirmation, because a contract may be disaffirmed after the creditors' attempting to enforce it. But a minor may do many things from which a confirmation may be established. For example, should he buy property and, after reaching his majority, sell it, this would be a confirmation of his purchase. Generally, con-

tinued possession and use of a thing is evidence of confirmation. If he should buy a horse and give his note for the amount, he might, after attaining his majority, return the horse and refuse to pay the note. To retain the horse would be regarded as a confirmation of the note. The evidence of confirmation would be still stronger after a refusal to deliver the thing that could be redelivered.

A minor who borrows money for the purpose of spending it in purchasing necessaries, and gives his note for the amount, perhaps can avoid that, but he would be still liable for the debt. And he is also liable for money paid at his request for necessaries.

The strong tendency of the modern law is to regard all acts and contracts, and all transactions of minors as voidable only. The courts are now constantly declaring that these acts are not void, but voidable only, unless they are manifestly prejudicial.

7. To contracts of a fraudulent nature made by a minor a different rule applies. Suppose he is nearly twenty-one and by misrepresentation concerning his age obtains credit for a bill of goods. Can he afterward escape payment on the ground that he made no contract for them because he was not legally capable of contracting? This question has been presented to legal tribunals more than once for answer. While the contract cannot be enforced, because none exists which the law will recognise, the minor is liable in an action of deceit, and the damage he must pay is the value of the goods purchased.

Thus, in another way, justice is done, and the law, declaring a minor's inability to make a contract, regarded.

8. A minor who has a guardian or parent cannot bind himself even for necessaries. Unable from want of sufficient discretion to judge what is best for himself, or to dispose of his property, his guardian or parent can act for him and protect him. This safeguard, though, would be of little worth could a third person deal directly with a minor and bind him by his contract. He would be left exposed to the consequences of his own foolishness, and to the craft of others.

Nor is a parent under any obligation to pay the debts of his child. And this rule extends even to those contracted for necessary food, clothing, and shelter. Shall a son be left to starve? No; the son must apply to the authorities, who will compel his father, if possessing the ability, to support him.

9. A minor may bind himself by a contract for necessaries, and also for things used in carrying on the business in which he is engaged, with the consent of his parent or guardian. On one occasion a guardian put his ward in possession of some land to cultivate, and furnished him with a yoke of oxen for that purpose. "Did not this," so the court inquired, "imply an authority from the guardian to the minor to buy a plow and harrow, and to hire additonal labour to make hay and gather his harvest, which he could not do alone?" And the question was answered in the affirmative.

10. A minor who avoids a contract can retain no benefit from it. Thus, if he contracts to sell a thing and refuses to deliver it, he cannot demand the price; or, if he contracted to buy a thing and refuses to pay the price, he cannot demand the thing purchased.

11. A parent may endow his minor son with the right to make a contract to serve another and to retain the reward he is to receive. This is called emancipation. Not infrequently the father claims the reward on the ground that he has not emancipated his son. This inquiry, when conducted by a judicial tribunal, is chiefly one of fact. An eminent jurist long ago declared: "We go so far as to say that, when a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings."[1]

Again, should a minor make a contract for his service, with his father's consent, he could disaffirm it at any time and claim, nevertheless, a reasonable sum for what he had done. Suppose he had agreed to work for another for a year, and, after working six months, should learn that he could earn more from another employer. He could rescind his contract and recover the worth of his labour for the period he served.

Lastly, his emancipation does not have the effect of transforming his voidable contracts into binding obligations. He can still take advantage of his

[1] Parker, Ch. J., Whiting v. Earle, 3 Pick, 201. Approved in Atkins v Sherbins, N. Eng. Rep. (Vt.), 482, June, 1886.

infancy. The effect of his emancipation, therefore, is simply to release him from his parents' control with respect to making a contract for his services and retaining his earnings.

12. Another class of persons who are not perfectly free to contract are married women. By the common law a married woman had very little authority to make contracts. The law gave all the personal property she had to her husband, rendered him liable for all her debts, and shielded her from any engagements she might make. By statute, in all of the states, her authority to make contracts has been greatly enlarged. In general these statutes give her authority to sign notes and other obligations, and to engage in business, buy and sell real estate and other property, almost as freely as if she was unmarried. Some restrictions remain in selling real estate, and becoming responsible for the debts of her husband and others. As the statutes of each state differ in some way, and are limited in their operation to the state enacting them, they are not given here.[1]

13. Other persons who are not always free to make contracts are aliens. By the common law they had no authority to own or hold real estate, nor could they give a good title to it by contract, or transmit a good title to their heirs. But their disabilities have been removed in all the states by statute, so that they can own property and make contracts like other persons.

14. Two other classes may be mentioned who are

[1] See Vol. VI., Chap. I., Sec. 3.

incapable, to a considerable degree, of making contracts — drunken people and persons who are insane. By the old rule of law a man who made a contract when in a state of intoxication was liable; his intoxication was no excuse or defense. But this principle has long since given way to one more in harmony with justice. A person who is so destitute of reason as not to know the consequences of his contract, even though this state of mind was produced by intoxication, is not obliged to fulfil or execute it.

To this rule a negotiable note taken by a third person without any knowledge of the maker's drunkenness is an exception, which is made for the protection of the paper. In all other cases the above rule now applies.

15. A different rule applies to the contracts of an insane man. Like a person who has not attained his majority, he is liable on a contract for the necessaries of life that he has received, and he would also be for merchandise innocently furnished on his order by a person who did not know of his infirmity. Insanity is a permanent state or condition of the mind that disables one from taking care of himself; drunkenness is a temporary disability that is voluntarily produced. Insanity is a misfortune; drunkenness is a vice. No man voluntarily does an act necessarily producing madness in order that he may become insane, but men drink that they may become drunk; and, when they thus deprive themselves of the use of their reason and voluntarily expose themselves to fraud, the law wisely refuses to treat them with

the same tenderness as those unfortunate beings who are deprived of their understanding.

SUBDIVISION 3. CONSIDERATION

1. There must be a cause or consideration for a contract.
2. Meaning of consideration.
3. A consideration need not be adequate.
4. A promise to pay another's debt without consideration is invalid.
5. An agreement to accept part of a debt for the whole is void.
6. Mutual fraud is a consideration.
7. An illegal consideration cannot sustain a contract.
8. The legal part of a divisible consideration can be enforced.
9. The compromise of a criminal charge is not a valid consideration.
10. Work or service is a consideration for a promise to pay for it.
11. The worth of a part of an agreed service can be recovered.
12. There can be no recovery for a voluntary service.
13. A promise is a good cause or consideration for a promise.
14. A contract which cannot possibly be performed cannot be enforced.
15. A contract resting on a consideration that has wholly failed cannot be enforced.
16. Illustration of the principle.

17. The consideration for changes in building contracts.
18. Though a consideration be needed, proof may sometimes be omitted.
19. When a moral obligation to pay is sufficient.
20. A contract may be modified without a new consideration.

1. There must be a cause or consideration for every contract. In other words, the law will not regard a person as having made a promise without a cause or consideration. A promise is not made for nothing. A negotiation or undertaking without a consideration is a naked bargain; and the promisor, even though admitting his promise, is under no legal requirement to perform it. In no case can a person be required to fulfil a promise or contract that is not based on a consideration.

2. The word consideration has a peculiar meaning. It denotes some substantial cause for the promise. This cause may be one of two things — i. e., either a benefit to the promisor or an injury or loss to the promisee in consequence of the promisor's conduct or request. Thus, if A simply promises B to pay him a thousand dollars in three months, the promise is worthless in law, even if in writing, for the promise is merely voluntary and is without any consideration.

Why should A make such a promise; what does he get for it? Nothing. As nothing is received or expected, the law protects him — even though he is so foolish as to make such a promise — against

B's attempt to enforce it. But a very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to sustain a contract.

To the above definition a fuller one may be given. Says Lawson: "A consideration which will support a simple contract is some right, interest, profit, or benefit, accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other."

3. A consideration need not be adequate. A court will not inquire into the exact proportion between the value of a consideration and that of the thing to be done or given in exchange. But it must have some real value, and, though this be very small, this circumstance may, even by itself, and still more when strengthened by other facts, imply or sustain a charge of fraud. Again, courts will sometimes not require the fulfilment of contracts that are without fraud, and will give only reasonable damages to the person who seeks compensation from the other in consequence of his failure to execute his undertaking.

Anson has presented forcefully another view of consideration worthy of notice. It is *evidence* of a contract. From this point of view adequacy plays a subordinate part.

4. The way is now prepared for inquiring what classes of contracts rest on a valid consideration. As a voluntary undertaking for which no consideration is to be received cannot be enforced, so, a promise

to pay, without consideration, the debt of another is of this character, and void. A promissory note, therefore, given by a widow for a sum due to her husband's creditor, is without consideration and cannot be recovered. Why should she pay it? She has received nothing.

5. An agreement without consideration between a debtor and a creditor to accept at a future time, a part of a debt for the whole, is void. Of course, an actual acceptance of a part of the money due from a debtor in discharge of the whole amount, would be a lawful and binding transaction.[1] But an agreement to accept at a future time, a part for the whole is of a different character. Why should the creditor give up a portion of his debt for nothing? To this rule there are many exceptions; for example, when the amount of the claim is disputed, or where mutual unsettled demands exist, or when the creditor receives some new benefit or advantage. A promise to accept less than the full amount of a doubtful claim is always valid.

An illustration of practical value may be added. A sued B and C. Before the trial of the case A released C in writing in these words: "I hereby release C from all individual liability for the claim upon which the suit against B and C is based, so that, if I fail in recovering judgment against B, C

[1] The rule has been often declared that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a sound, collectible debt, for it is no consideration for a promise to forego the residue. But, as Lawson says this is a harsh rule, and the "courts seize on any circumstance" to take a case out of its operation. Consequently, the exceptions are so numerous as "to make the rule itself more shadow than substance." American Law of Contracts, § 104, p. 116.

is released from all liability." A failed to recover against B, and then brought a suit against C, who interposed this release as a defense. It was ineffectual because it had been made without any consideration.[1]

6. A note procured by fraud is generally worthless, and the door of justice is shut against its collection; but the mutual fraud of the parties to a note is a binding consideration. Says an eminent jurist: "It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them." Thus, A, who feared bankruptcy, for the purpose of defrauding his creditors, gave his property to his brother B, taking four notes from him. As the transaction was a mutual fraud, B could not have escaped had A demanded the payment of either of the notes. As B could not set up his own fraud as a defense against the person to whom they were payable, neither could he make this defense against a bank that had taken one of them as security for a debt.

7. The law will not sustain a contract founded on an illegal consideration, for such a consideration enters directly into the instrument and destroys its validity, because the law will not permit itself to be violated with impunity. For this reason a promisory note given in a gambling transaction in a state where gaming is a statutory offense is void, though it is negotiable in form and is transferred to an innocent holder or owner, who has given therefor value or money.

[1] If A had added a seal to his signature the writing would have been effective.

Were such a note collectible by a third party the law which declares all gambling transactions void could be defeated. For the same reason a promissory note given to a broker to cover losses incurred in a stock-gambling transaction is void in all the states where such a contract is regarded as a wager.[1]

8. If the consideration for a contract is partly legal and partly illegal, and no separation of the parts can be made, there can be no recovery of any part; but, if there are several distinct considerations, some of which are legal and some not, the legal portion may be recovered. Thus, no one could once recover in Pennsylvania on a note given for a tavern reckoning exceeding twenty shillings, but if other legal items of account entered into the consideration these might be the subject of a legal recovery.[2]

9. The compromise of a criminal charge of a public nature is not a valid consideration for a contract. As an eminent English judge long ago remarked: "You shall not stipulate for iniquity." The reason is clearly one of public policy. Such a compromise ought never to be made, but often is for the sake of recovering a part of the loss.[3] Not infrequently a thief makes such a compromise, agreeing to return a part of the money, or the thing he has taken, provided that no prosecution shall be begun against him.

[1] Harper v. Young, 112 Pa., 418; Unger v. Boas, 13 Pa., 601; Daniel on Neg. Instruments, § 806-808, p. 804 (Fifth Edition).

[2] Yundt v. Roberts, 5 Serg. & Rawle, 138.

[3] Such a contract "is to tempt a man to transgress the law and to do that which is injurious to the community." Collins v. Blantern, 3 Wilson, 350. Of course, such an agreement must be worthless, because the prosecution of criminals is the work of the state. Nevertheless, a corporation or other defrauded party may, by withholding evidence of the criminal's guilt, prevent, in fact, the state from obtaining a conviction.

The law is less strict on this subject than formerly and to some extent has been changed by statute. For example, a note given in settlement of a criminal prosecution for obtaining money or goods by false pretenses may now, by statute,[1] be enforced. But the promise of a payee of a note to prosecute the makers for forgery is illegal, and cannot be enforced. As forgery is condemned by statute, and as the crime cannot be compromised, a note founded on a compromise of the unlawful act is invalid.

10. Any work or service rendered to, or for, a person on his request is a good consideration for a promise to pay for it. If no promise is made the law will imply one. In other words, it presumes that he has made such a promise, and will not permit him to enter a denial. The same rule applies to the payment for goods or property of any kind delivered to anyone by his request.

11. Again, should A agree with B to work for him for a specified period, and, after working awhile, leave without good cause, can A recover anything for the service rendered? In some states A can recover what his service is worth, B having a right to set off or deduct the amount of any loss or damage he may have sustained; in other states A can recover nothing. Wherever A can recover anything this is not by virtue of his contract, for the reason that, having broken it, he cannot ask the court to enforce it. He recovers, if at all, on the ground of an implied contract; in other words, the law enables

[1] In Pennsylvania.

him to recover, after due consideration of all the facts, the worth of his service, whatever it may be, for the reason that it is just for him to receive so much.

12. No person can make another his debtor against his will by a voluntary offer of work, or money, or goods; but when such an offer is accepted, and the work, merchandise, or other thing is retained, the law generally will imply or presume that it was offered by the other party's request, and will imply his promise to pay therefor. Consequently, the law will require the promisor to fulfil his promise, unless it can be shown that the thing was a mere gift.

13. A promise is a good cause or consideration for a promise, and this frequently occurs. For example, a promise to accept goods and pay for them is a good consideration for a promise to deliver them. An illustration of this principle is an agreement by creditors with their debtors, whereby they are to receive a sum or dividend, or other thing, in discharge of their indebtedness. Such agreements are often called compositions. Usually, a fixed payment, or several payments, are to be secured to each creditor in proportion to the debtor's assets. In such a case each creditor signs the agreement, and the promise of the one is valid or binding on each and all of the others.

This principle, that a promise is a good consideration for a promise, has sometimes been applied to subscription papers, the promise of each subscriber forming a good consideration for the promises of the rest. As the doubt concerning the liability of the

subscribers is the want of a consideration, it may be remedied by affixing a seal to each name, or by affixing a seal which is declared in the instrument to be the seal of each one.

In the way of more specific principles (1) the act of one who subscribes to the shares of a contemplated corporation is a mere proposition or offer which may be withdrawn any time before the organisation. (2) After the organisation is completed he is bound by virtue of the charter or statute authorising the corporation. Says Morawetz: "The validity of a subscription for shares depends upon the charter or statute under which it is made; and, if the terms of the statute have been complied with, the subscription will be binding, although it will not be binding considered as a common law contract by reason of the absence of a legal consideration." (3) One who subscribes to raise a fund for charity, education, an improvement, and the like, may withdraw unless some act has been done in reliance thereon, like the purchase of land. (4) If such an act has not been done a subscriber is not bound, even though the terms of the subscription be complete, as the raising of a specified sum of money for a college. (5) Death before such an act is done operates as a revocation, and the subscriber's estate is not bound.

14. No contract or promise can be enforced by a person who knew that its performance was wholly impossible. But he cannot defend himself by showing that the performance of his promise was impossible

whenever by his own fault, or by his own personal misfortune, it cannot be executed. There are, however, promises or contracts which, from their nature, must be construed as if the promisor had said, "I will do so and so if I can." For example, should A promise to work for B for one year at twenty dollars a month, and, at the end of six months, be disabled by sickness, B cannot compel him to fulfil the contract, and A can recover his reward for the time spent in B's service. A mere want of money is not regarded by the law as a legal impossibility.

15. Lastly may be considered contracts in which there is a failure of consideration. If a consideration is given, apparently valuable and sufficient, but proven to be worthless before the contract is properly performed on the other side, the law does not require anything more to be done. Money paid on such a contract can be recovered (though without any increase or addition) as a compensation for the other's loss and disappointment. A consideration that has partly failed, but leaves a substantial, though much less valuable, consideration remaining, is a sufficient foundation for requiring the other party to fulfil his promise. He may then be sued on his promise, but is entitled by deduction, set-off, or in some way to an allowance or indemnity for whatever loss he may have suffered in consequence of the partial failure of the consideration. Thus, should B promise to pay money for work that is to be done in a specified way, or as the price of a thing that is to be made for

him, and no work is done, or the thing is not made, A cannot enforce the promise for the payment of the money because the consideration has failed. But if the work was done, though not in the specified manner, and accepted by B, he may show that the consideration for his promise has partly failed, and may have a proportionate reduction in the amount that must be paid.

16. Another illustration of the failure of consideration may be given. A agreed to deliver to B some machinery, and took notes in payment. At the same time it was agreed that the ownership of the machinery should remain with the seller until the notes were paid. Before the time for paying them arrived the machinery was destroyed by fire. As the consideration for the notes had failed before their payment, the maker was no longer liable.

17. Another application of this principle may be mentioned. A difference sometimes arises when A undertakes to do something for B, for which A is to be paid a specified price. In executing the undertaking A departs materially from B's direction. What are the rights of the parties? This question arises most frequently in building contracts, in which there is often some departure from the original undertaking. If B assents to the alteration he is bound as strongly as he would have been by the original contract. He may assent openly, by word or in writing, or by seeing the work done and approving it, or by silence, for silence in such circumstances would generally be equivalent to an approval. But,

if the change were one that B had a right, either from the nature of the change, or from A's language concerning it, to suppose would add nothing to the cost, then no promise to pay an increased price would be inferred from either an express or open approval. Generally, if A does or makes what B did not order or request, he can refuse to accept it, but when B does accept he must pay therefor. For example, should A choose to add something to B's house without his request, or make some alteration therein, B may retain the thing and yet not be liable to pay therefor, and A has no right to take it away unless he can do so without injury to the house. This rule would apply whether the addition or alteration was large or small. Building contracts sometimes provide that B shall not pay for any alteration or addition unless it has been previously ordered in writing. Without such a provision B would be liable for any alteration he ordered, or voluntarily accepted after its completion. It is also sometimes agreed that, for any additions or alterations, the same rate shall be paid as for other work. The remark may be made that the law would imply an agreement of this character if it were not made by the parties themselves.

18. Though a consideration is always required, in some cases the proof that one was given may be omitted on trial. The most common case is a promise in writing wherein a seal is added to the promisor's name. No consideration need be proved, because the law presumes there was one. Suppose that two

writings are similar in form; one is sealed, the other is not. The law supposes or assumes that a sealed instrument is drawn with care, is of more solemn character than an unsealed one. The law, therefore, assumes or implies that there was a consideration in the one case, while in the other it must be proved.

There are many principles of the law founded on reasons that grew out of conditions or circumstances that no longer exist. In the olden time, when people could not write their names perhaps, much less deeds and other papers, they used seals as proofs of their signatures. Every person had a seal of his own, and, whenever he used it, the writing was regarded as important; and in its preparation all the formalities were remembered, and especially the cause or consideration. Consequently, the law did not require any proof of a consideration in such cases. In modern times, while many an unsealed instrument is drawn with just as much care, and a seal conveys no special or distinctive mark or characteristic, as almost all seals are alike, nevertheless a different rule of proof applies to sealed, from that applied to unsealed, instruments.

19. A moral obligation to pay money is a good consideration for a promise to do so, whenever there was, in the beginning, an obligation to pay. Thus, the subsequent promise of one who has borrowed money of another and given his note therefor, which by lapse of time has ceased to be binding, can be enforced because there was a good consideration

for the first or original promise; namely, the money received from the lender.[1]

20. A contract may be modified by mutual agreement without a new consideration. Says the court in a case calling for the application of this principle: "The consideration for the original agreement is imported into the new agreement, which is substituted for it. No good reason is perceived why the same principle does not apply to the recision of a contract."

SUBDIVISION 4. ASSENT

1. Parties to a contract must agree to the same thing in the same sense.
2. When the assent must be given.
3. Effect of accepting an offer on a condition.
4. Assent may be inferred from circumstances.
5. Assent is a question of fact.
6. An accepted proposition that is to be put into writing is usually not binding.
7. When assent has been given the contract cannot be altered without another assent.
8. Offers on time.
9. How long may an offer continue?
10. A consideration is not required to sustain an offer.

[1] "Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations or bankruptcy, is good, without other consideration than the previous legal obligation. It must, however, be distinct and specific; and it has been held that the payment of interest, or even payment of part of the principal and its indorsement on the note by the debtor himself, is not sufficient to warrant a jury in finding a new promise to pay the whole debt." 1 Parsons on Contracts, p. 471.

11. An offer for a fixed time may be recalled.
12. Illustrations of this principle.
13. If no time is fixed the law presumes a reasonable time.
14. Offers and replies by correspondence.
15. An illustration of a bargain by correspondence.
16. An offer cannot be turned into an acceptance.
17. Rewards.
18. A contract is binding from date of accepting offer.

1. To make a contract the parties thereto must agree to the same thing in the same sense. If this be not done the contract is not complete. Thus, on one occasion, a person offered to sell to another by letter a quantity of "good barley" at a specified price. The other replied, "We accept your offer, expecting you will give us fine barley and full weight." As the barley was not delivered, the buyer sued for the injury or loss he had suffered. On the trial of the case the evidence showed that the terms "good" and "fine" were well known in the trade, and meant different qualities of barley, and that there was not an acceptance of the offer of good barley. Consequently, nothing could be recovered. Again, a person sent an order to a merchant for a quantity of goods on well-defined terms of credit, and the merchant sent a smaller quantity on a shorter term of credit. The goods were lost by the way, and the sender having sued to recover for the amount, it was decided that he must bear the loss, as there was no sale or contract between the parties.

2. Usually the assent must be given at the time of making the offer. In many negotiations an agreement is immediately completed; or, if it is not, then both parties understand that the negotiations are at an end.

3. Again, a person who receives the proposition or offer, and accepts it on any condition or with any change of terms, does not complete the contract unless the party who made the offer assents to the modification. For example, in the case of a party who offers to buy goods at a named price, and specifies the mode of sending them, which is accepted, and the goods are sent as directed, and are lost on the way, the buyer is the loser, because the goods were his by the sale, which was completed by the acceptance of the offer. But a seller who should accept the offer, and in his acceptance make some modification of the terms, and then send the goods would be the loser, should they be lost, because the contract of sale was not completed.

4. Sometimes assent may be inferred from circumstances. Thus, a contract in writing may be good though signed by one only, for the assent of the other may be inferred from his possession of the paper and other circumstances. Another illustration — the placard of rules posted in factories for operatives. These are regarded as agreements or contracts with them, and may be enforced. Of course, an operative in a mill is not bound unless he knew of them; but, when knowledge is proved, he is as clearly bound as he would have been by putting them into his hand at

the time of employing him. Another example may be given. A son was taken sick, and his father declared that whoever would take care of him should be well paid. This offer was made known to a person who was then attending him, and who continued his service, and after awhile demanded payment from the father. By thus caring for him the nurse was regarded as accepting the offer. Compliance with the proposition, especially when no notice of acceptance is required, is the most significant evidence of acceptance.

A voluntary compliance with the terms of an offer by one who had previously declined them would render the acceptor liable.

5. These illustrations are sufficient to show the nature of the principle of assent to a contract. They also clearly show that this is a question of fact that must be determined in each case. Have the parties assented or come together? In other words, have their minds met and thus completed their negotiation? If they have, then the law regards the assent as complete; otherwise, no contract has been made.

6. Another important principle is that a proposition immediately accepted, but which is to be put into writing, is usually not binding. Thus, on one occasion A met B accidentally, and said to him that he could sell coal as cheaply in Cincinnati as at Pittsburgh. B replied, saying that he would take a quantity at Cincinnati at a specified price, which was also the Pittsburgh price. A also said he must be paid in cash, and have security for the return of the barges that were to convey the coal. B replied, "Certainly,"

and prepared a memorandum of the agreement and drew his check to A for the price of the coal. A said, "I will have the papers drawn to-morrow." B called on A the next day, a dispute arose, the agreement was not put in writing, and nothing further was done. The contract was regarded as not completed.

7. For the same reason, that when assent has been given to the terms proposed the contract is completed, they cannot be altered without another assent. In other words, a contract cannot be altered by the simple act of one party. There must be a second meeting of minds to change its terms. Thus, A agreed by written contract to carry coal for B from one place to another. B afterward wrote to A, proposing alterations in the quantities that were to be carried, to which A did not reply. The contract remained unaltered.

8. We shall next describe offers made on time. Strictly speaking, every offer is of this character, but, in the large number of transactions, the offer and the assent or dissent are nearly at the same time. If one says, "I will send you this thing for a specified price," and the other answers, "I will take it," the assent is complete, and the contract is fully formed. But the answer follows the offer, and it cannot be actually at the same time. The offer, however, is regarded as continuing until the acceptance, if this is done at once. Though the party addressed pauses a moment or two to think about the offer, still his assent makes a contract, for the offer continues until it is withdrawn. How long does the offer continue? The answer is, a reasonable time; and what this is must

depend on the facts in each case. If the party addressed goes away and does not return for several days, and then says he will accept the offer, he is too late, unless the proposer, in his turn, assents. So he would be, probably, if he came the next day, or even the next hour.

"An offer without more," says Justice Mitchell, "is an offer in the present to be accepted or refused when made. There is no time which a jury may consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it. Until it is accepted it may be withdrawn, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail."

9. What is a reasonable time depends on the nature of the proposal and the situation of the parties. Oral evidence of known facts may be admitted to assist in determining what would be a reasonable time; but when a written proposition is to be accepted within a reasonable time oral evidence is not admissible to show that the parties agreed that the proposal should remain open for any specified time.

An acceptance of an offer to sell real estate five days afterward was held to be within a reasonable time.

The person making the offer may say how long the offer shall continue. He may say to the other, "I will give you an hour, or a day, or a week to make up your mind." Then the person to whom the offer is made knows the duration of the offer. He may avail himself of the specified period for making inquiry,

and if, within the time fixed, he expresses his assent, the contract is completed as effectually as if he had answered as soon as the offer was made.

10. It has sometimes been said that the person making the offer cannot be bound whenever the assent has been delayed, even though a fixed time was given to the other, because there is no cause or consideration for continuing the offer. But, as an eminent law-writer has remarked, if one who makes an offer that is instantly accepted is not bound because there is no consideration, then it might be said that he would not be bound by an answer made within a specified time. No one doubts that an offerer is bound by an immediate acceptance, though he receives no consideration therefor. If this be true why does not the same principle apply to an acceptance that follows an offer in a second, or a minute or two, or even a longer period, not passing beyond a reasonable time or a time mentioned by the proposer himself?

11. However, an offerer who states a specified time for acceptance without a cause or consideration may, at any time before his offer has been accepted, recall it, and he may do this even if he gives no time. And, if he makes an offer that is instantly recalled, it cannot be accepted by the other party whatever may have been his intentions.

12. Two or three illustrations may be given. In one of them a person was appointed an agent of a fire insurance company, with authority to take applications for insurance. An offer for insurance was made to a person, but was not accepted for nearly six months.

This was deemed too late. Undue delay in accepting an offer may be, and should be, treated as a refusal, and the proposer is not bound by a tardy acceptance. A proposal by letter remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to the matter with reasonable diligence. In another case, B having agreed to build a house for A, made a contract with C for the materials. As A owed money to B on account of the contract, he wrote a letter to C, saying, "If B gives you an order on me for the bill of materials I will accept it and pay it." C took no action concerning the letter for more than two weeks and then he wrote a reply to A, reminding him of the fact that he had sent a letter indicating his willingness to accept an order for the materials he had furnished. At that time A had paid to B the full amount of his indebtedness to him. Two months afterward B gave C an order on A for the price of the materials. The delay was too great in acting on this order to make A liable for the amount. Surely C had no reason to suppose after such a long delay that A's offer was still open for acceptance. Most offers, as we shall shortly see, are for very brief periods of time, or for an immediate acceptance or refusal, and A doubtless supposed that, if C did not choose at once to accept his offer to pay the bill for the materials, or to become responsible for them, he expected to look to the buyer for his purchase money. Great confusion would indeed be wrought if, after making an offer of this kind, and delaying two or three weeks,

or perhaps longer, an acceptance could be sent binding the person who made the offer.

One other illustration may be given. A railroad company desired to buy some land, and the owner stated in a letter that he would sell if his offer were accepted within thirty days. After twenty-five days the railroad company accepted the terms. The owner then declined to let the company have the land, having made up his mind that it was worth more. He maintained that he had a right to withdraw the offer because nothing had been paid to him for the delay, but the court decided that his offer continued through the specified period unless it was withdrawn. Had the owner done this the railroad company could not afterward have accepted his offer. But, after the offer had been accepted, the minds of the two parties had met, the contract was complete, and no withdrawal could be made.

13. If the proposer fixes a time, or expresses his intention, then the other party knows exactly what it is. If no definite time is stated then the inquiry concerning a reasonable time is one of fact that ordinarily must be decided by a jury.

In applying this principle to subscriptions, how long is a person bound by a promise contained in a subscription? If no time is fixed and there is no express withdrawal, the court will look into all the circumstances, and inquire what the parties actually understood or intended, and endeavour to carry this intention into effect.

14. Lastly, may be considered offers and replies

by correspondence. Many contracts are made in this manner, either by letter or by telegram. At what time, or by what act, is such a contract completed? If A writes to B making an offer, this is regarded as continuing until it reaches B and during a reasonable time thereafter for accepting it. It may, however, be withdrawn by A at any time before acceptance, but is not withdrawn in law until a notice of withdrawal reaches B. Thus, should A in Philadelphia write to B in New Orleans, offering him a certain price for one hundred bales of cotton, and the next day alter his mind, and write to B withdrawing his offer, and the first letter should be received before the second, B has the right to accept the offer and by his acceptance bind A. Should B delay to accept until the receipt of the second letter, A's offer would then be effectually withdrawn. It is a sufficient acceptance if B writes to A to this effect, and puts his letter into the post-office. The minds of the two parties have met as perfectly as if the acceptor had put his answer into the hand of a messenger sent by the offerer himself. The contract is properly held to be complete when the acceptor has mailed his letter of acceptance, for another reason, namely, the offerer contemplated and implied that the acceptor would manifest his intention in this manner. Offers by letter can be withdrawn or set aside by the quicker action of the telegraph. Thus, in the case just mentioned, should A, sending his first letter, telegraph a withdrawal of his offer to B, which reaches him before his written offer, his withdrawal would be effectual. But, if an offeree

should accept and mail his offer, he could not revoke it by a subsequent telegram saying that he declines the offer, even though this should reach the other party before the letter of acceptance. Sometimes the case has been put of an offer sent by letter in a sailing ship, and a withdrawal sent later in a steamer that has arrived first. In such a case the withdrawal would be effectual. One can readily imagine cases in which, perhaps, parties who were dishonest would deny receiving first the information sent last, but probably in most of them it would not be difficult to trace the sending of a telegram, the time it was received at the other place, its delivery, etc., to the party for whom it was intended.

Though the postoffice is usually the agent of the sender of a letter, in the case of an offerer the postoffice is his agent or servant both in sending his offer and receiving his reply.[1] Consequently, an acceptance is binding as soon as the letter is delivered to the postoffice.

15. An illustration of a bargain by correspondence may be added. It related to the purchase of iron. A wrote to B, "We will take one hundred tons, delivered [at a place mentioned] as early in the spring as the navigation will admit," and a further quantity at any time between two dates that were mentioned. To this B replied in a few days: "We will have no metal to deliver after the spring freshet, or, in case of no freshet in the river, in the canal immediately after. Therefore, it will be necessary for you to say what

[1] The rule is otherwise in Massachusetts. In Massachusetts an acceptance by letter or telegram is not complete until it reaches the offerer. This rule prevails only in that state.

quantity you will take on spring delivery." An immediate answer was requested. In answer to this, A wrote that he would take a specified quantity if delivered in a way described, or one hundred and fifty tons if delivered in another way. To this letter no answer was given, and A tried to recover damages for the non-delivery of the one hundred and fifty tons. This was a request for a definite order, but the court decided that the contract was not complete without a further reply from B. The court declared that the last letter did not complete the transaction. It suggested a new proposal, and required another communication to complete it. It might not have suited B to furnish one hundred and fifty tons in the spring, and no one but himself could say that it would. He had not said so; he had left A's letter unanswered, and the transaction therefore was unfinished.[1]

16. A person who makes an offer cannot turn it into an acceptance. Thus, a sly old uncle offered by letter to buy his nephew's horse for thirty dollars, and added, "If I hear no more about the matter, I consider the horse is mine." No answer was received; nevertheless there was no meeting of minds and no contract, for only one mind had been active.

17. Offers or rewards are often made by advertisement and, when accepted, are usually binding. Thus, the owners of a cure-all medicine — a carbolic smoke-ball — offered to pay £20 to any person who contracted influenza after having used one of their smoke-balls

[1] "By return mail" does not mean the next mail. A delay, however, of three or four days is too long.

in a specified manner. A person followed the directions, and, failing to receive the benefit expected, sued for the offer and recovered. A case worth noting has been decided in Illinois. A person offered the following reward: "Harness stolen! Owner offers $100 to anyone who will find the thief, and another $100 to prosecute him." Stimulated by the reward, the thief was caught and prosecuted, and the reward was claimed. This demand for the money cooled down the offerer immediately, and he resisted payment, and, forsooth! escaped, the court declaring that his advertisement was not an offer to pay a reward, but an explosion of wrath.[1]

18. A contract dates from the acceptance, and not from the time of the offer, and is regarded as made at the place of acceptance, and, therefore, construed or interpreted by the law of that place. But if it is to be performed at another place, usually it is interpreted by the law of the place of performance.

SUBDIVISION 5. WRITTEN CONTRACTS AND THE STATUTE OF FRAUDS

1. Some contracts must be in writing to comply with the statute of frauds.
2. The more important sections of the statute.
3. A promise by an executor or administrator.
4. A promise to pay the debt of another.

[1] A man's house was burning, and he offered to give $5,000 to anyone who would bring the body of his wife out of the building, "dead or alive." She was rescued, and the reward was demanded. He was obliged to pay. He was not permitted to defend on the ground that his words were merely an explosion of affection. It is difficult to distinguish between the two cases.

5. Agreement in consideration of marriage.
6. Agreement not to be performed within a year.
7. Agreement concerning the sale of land.
8. Nature of the writing required to satisfy the statute.
9. The sale of goods.
10. Application of the statute to a contract for the manufacture of an article.
11. The statute does not apply to executed contracts.

1. The law requires some contracts to be in writing. A statute relating to the subject was passed during the reign of Charles II. (1677), requiring this to be done for the purpose of preventing frauds and perjuries. It was supposed that a law requiring contracts to be put in writing and signed by the person who was to pay for the thing purchased, or to do the thing promised, would lessen fraudulent practices. Yet it has been remarked by those who understand the history of this statute that, whatever may have been the intention of its authors, it has been the means of enabling persons to injure others in the way of opening a most convenient door for not fulfilling contracts which were honestly made, but which they did not wish to execute. Many a contract made in good faith has not been enforced, because the breaker did not comply with the law, by putting it in writing and signing his name thereto. This statute shows how very slowly the people learn the laws; for, though it was re-enacted in this country in the early times, yet there are many to-day who are not familiar with it, and consequently do not observe it.

2. This statute has been enacted in nearly every state in the Union, with some changes. The principal provisions of the English statute re-enacted in this country, and to be considered here, are the fourth and seventeenth sections. The former provides that no executor or administrator shall be personally liable on any promise that he may have made; nor any person on a promise for the debt or default or miscarriage of another; nor shall any person be liable on an agreement made in consideration of marriage; nor shall any contract or agreement for the sale of lands or leasing of them that is not to be performed within one year from the time of making it, be valid, unless the agreement, or some memorandum or note of it, is in writing and signed by the party who is charged as having made it, or some other person lawfully authorised by him to sign the same.

The seventeenth section provides that no contract for the sale of any goods, wares or merchandise for the sum of fifty dollars, or more, shall be good, unless the buyer has accepted part of the goods thus sold and actually received them, or given something in the shape of earnest to bind the bargain, or in part payment or unless there shall be some note or memorandum in writing of the bargain made and signed by the parties to the contract or their agents.

3. The first clause relates to the promise of an executor or administrator. The duty of these persons, as is well known, is to settle estates. The law does not make them personally liable for any contracts

made by them. They can, indeed, make contracts for which the estates they represent may be liable, but personally they are free.

4. The next provision relates to promises to pay the debt of another. This provision has often been difficult to enforce. A person, of course, is liable on his own promise to pay for whatever he may purchase, but is he liable to pay for the debt, or default of another, unless there be an agreeement in writing, as the statute requires? In such a case is the promise to pay one's own debt, or to pay the debt of another? One may think that this question can be easily answered, but, in truth, it is often very difficult to answer. For example, if two persons go to a shop and one buys and the other, in order to give credit, promises the seller, "If he does not pay you, I will," this is a promise to pay the debt of another, and is void unless it is in writing and signed by the promisor. But if he says, "Let him have the goods, I will be your paymaster," this is an undertaking for himself, and the law regards him as the actual buyer and the other only as his servant. Again, if B furnishes goods to C on A's express promise to pay for them, saying to B, "Let C have goods to such an amount, and I will pay you," the credit is given to A, and in that case C is not liable for them and A is the immediate debtor. The undertaking is said to be original with him and not a collateral one; therefore, it need not be put in writing. Whether a promise is an original one to pay one's own debt, or a collateral promise to pay the debt of another, is a question of fact to be determined

in each case. The cases calling for this application of the statute are numerous.

Whenever the main purpose and object of the promisor is not to be responsible for the debt of another, but to serve some purpose of his own, his promise is not within the intent of the statute, although in form it may be a promise to pay the debt of another. If there be coupled an oral promise to pay the debt of another and also to do some other thing, the latter thing can be enforced at law, but not the promise to pay the debt.

5. The clause relative to agreements made in consideration of marriage requires brief explanation. The promise to marry is not within the statute, but all promises in the nature of a settlement or advancement in expectation of marriage must be in writing.[1]

6. Another clause of the fourth section of the statute relates to agreements that may not be performed within a year. This does not apply to agreements which, at the time of making them, are understood by the parties to be fairly capable of completion within a year regardless of any circumstances, although in fact their execution may extend far beyond that period. It, therefore, does not apply to a contract for personal service for an indefinite period, or for a term of years, which will end with the death of the servant, for the reason that the contract may be fully performed within a year. Nor does it apply to any kind of contingent contract that may be performed within that period; for example, the payment of money on the return of a ship.

[1] See Vol. IV., §26, p. 959.

7. Another clause relates to the sale of land, or an interest therein. The language here used is very broad, and includes within its scope all leases of real estate for any period no matter how short; but, in some states, leases having a period not exceeding one year are by statute declared valid, even though they are not in writing. It may also be remarked that it is not always easy to distinguish between an interest in land and a mere lease to use it for some special and temporary purpose; for example, to put hay or grain there, or to keep a wagon or implements, for a license need not be in writing, while an interest in land must be, to comply with the statute. With respect to fruits and nursery trees, the courts generally hold that such contracts are not an interest in land, whenever the intention of the parties is to remove them at once, or within a short period.

8. Next may be considered the nature of the writing required to satisfy the statute. It need not be on a single piece of paper. If there are several letters from which a contract can be formed these are clearly sufficient for the purpose. Not infrequently a letter, or a series of letters, exists from which a contract can be made out. Whether there must be a consideration in writing or not is a disputed question, some of the courts holding that this must thus appear; others that it may be proved by other evidence. With respect to the signing this need not be technical or formal. If a party writes his name in the beginning, or in any part of the agreement with that intention, this will be regarded as a sufficient signing to satisfy the statute.

Moreover, the signing is sufficient if printed or written with chalk, or any other material with which writing or printing can be legibly done, as the statute does not specify the use of any particular material. An agent, of course, can sign for his principal. A signature by an agent will suffice.

The memorandum must contain the names of the parties and all the other essentials of a contract. Again, the records of a corporation, containing the terms of the contract and duly signed by the proper officer, are a sufficient memorandum to satisfy the statute.

9. The seventeenth section relates to the sale of goods, wares, or other merchandise. The amount varies from thirty to fifty dollars in the statutes of the several states. To comply with this there must be a delivery and acceptance. For example, A meets B and agrees with him to purchase one hundred cords of wood for five hundred dollars. B sends the wood immediately to A, but, as the statute requires an acceptance or actual receipt of a portion, A may return the wood if he desires without any reason; and, if there has been no signed written memorandum or actual receipt of a portion, B cannot recover his money. A delivery is sometimes said to be constructive. For example, the delivery of the key of a building in which property is contained; or, if the goods are in storage, the making of an entry by the direction or assent of the vendor on the books of the warehouseman; or the delivery and receipt of a bill of lading properly endorsed; or the pointing out of

the thing if it is difficult of removal. It is said that delivery and acceptance are sufficient if there has been any transfer of possession or control of the property by the seller to which the purchaser has assented, whereby it is intended that it shall pass from the seller's possession into that of the buyer's. With respect to earnest money it may be remarked that part payment may be of any amount which the one party may choose to pay and the other to accept.

10. A contract to make and deliver an article is not within the meaning of the statute, but a contract to deliver a thing without any reference to its manufacture at a future time is within its meaning. Says Parsons, after showing the difficulty in extracting, from the numerous and contradictory decisions, a rule: "A pure executory contract for the sale of goods, wares, or merchandises, is as much within the statute as a contract of present sale. A contract for an article not now the seller's, or not existing, and which must, therefore, be bought or manufactured before it can be delivered, will also be within the statute if it may be procured by the seller by purchase from anyone, or manufactured by himself, at his choice, the bargain being in substance as well as form, only that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But, if the contract states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labour, skill, and material, so that they cannot be discriminated, it is not a contract of purchase and sale, but a contract of hiring and

service, or a bargain by which one party undertakes to labour in a certain way for the other party, who is thereupon to pay him a certain compensation; and this rule is, therefore, not within the statute." [1]

11. The statute does not apply to executed contracts. But an oral contract within the statute, partly executed, will control the rights of the parties to that extent.

SUBDIVISION 6. PAYMENT

1. Payment can be made only in cash.
2. What is meant by a tender.
3. What kinds of money may be tendered.
4. Why not all kinds.
5. Effect of tendering payment.
6. A creditor cannot afterward take advantage of an informality.
7. A lawful tender and payment into court is a good defense.
8. A note or check is not absolute payment.
9. Whether it is payment is a question of intention.
10. Is the note of a third person payment?
11. A creditor should be diligent in collecting a check.
12. When a check is not paid, a creditor can collect original debt.
13. Application of money when the debtor owes several debts.
14. Application by bank of a customer's deposit in payment of his note made payable there.

[1] Vol. III., p. 60.

15. Application of customer's deposit to note not made payable there.
16. Bank cannot pay unmatured note.
17. Nor apply trust money in payment of his note.
18. If note is endorsed bank must apply customer's deposit in payment.
19. Unless the depositor has appropriated it.
20. What can be done when the deposit is insufficient.
21. Where shall payment be made.
22. To whom shall payment be made.
23. Effect of part payment.
24. Effect of a discharge under seal of a debt partly paid.

1. Many questions have arisen concerning the mode of making payments. Parties may agree to any mode of payment they please. The amount may be paid in money, or by a bill or note. Unless an agreement is made, the only payment known to the law is cash. This a debtor must pay when his debt is due, or at least he must tender the amount due to his creditor.

2. What is meant by tendering payment? It means the offering to one's creditor in legal money the amount due him. Not every kind of money can be used in making a tender. First of all, cash can be used for this purpose, by which is meant gold or silver.

3. Silver coins, except the dollar, are a legal tender only to the amount of ten dollars, and the minor coins, the five and one-cent pieces, to the amount of twenty-five cents. There are many kinds of paper

money and gold certificates. Only one kind can be used in making a tender in all payments — the notes issued by the United States Government, and commonly called legal-tender notes. National bank notes are a legal tender to the Goverment, and by one national bank to another, but cannot be legally tendered in payment of a debt by one individual to another.

4. Why has not a national bank note the same legal-tender power as a United States note? Because Congress has declared what notes shall be a legal tender and what not. One may ask, is not a five-dollar bank note worth as much as a United States note of a similar denomination? Unquestionably, yet this does not endow it with legal-tender power, except to a limited degree, as already explained.

5. If the proper kind of money is not selected and used by the debtor in making a legal tender, the law regards him as not having offered to pay his debt; and, if his creditor should sue him for the amount, he could not claim or defend that he had paid it, or made a legal effort to pay it. On the other hand, when a debtor has offered to pay his debt in legal money, then his creditor, should he sue for the amount, could not recover the costs of his suit, but simply the money that was offered or tendered to him.[1]

6. Generally, if a tender be refused for any specific reason the creditor cannot afterward take advantage of any informality to which he did not object at the time the tender was made. A tender of a larger sum

[1] "A plea of tender," says Parsons, "does not bar the debt, but it puts a stop to accruing damages or interest for delay in payment." 2 Parsons, p. 791.

than is due may be made, but, should the debtor require a repayment of the balance, the tender would not be good. Furthermore, there must be no condition at the time of making a tender, not even that it shall be received as the full amount due; nor can a receipt in full be demanded, but a receipt for the amount tendered or paid may be.

7. If a creditor declined to receive the amount tendered by his debtor and was sued, he might tender the amount he thought due to a proper officer of the court; and if the judgment against him were not for a larger amount the costs of the action would be thrown on the plaintiff.

8. A note or check given for a bill or other obligation is not an absolute payment. It is of no higher character than the note itself, which is not money. Again, a note given after the accounts between two parties have been settled is evidence of the settlement, but not payment of them. But, in every case, it is payment provided the parties agree that it shall be. Unless such an agreement is made the note or check is conditional payment only, and remains so until the note or check is paid. When this happens then the bill for which the note or check was given is paid, but not before.

9. Whether the note, check, or other instrument is to be considered as payment or not is a question of intention. Unless this is clearly proved the instrument does not operate as payment.

10. Is the note of a third person, transferred to a creditor, payment of the debtor's debt? It is pre-

sumed to be payment when this is understood by the parties as shown by the creditor's giving the debtor credit for the amount. A debtor who endorses such a note is liable simply as an endorser, and he can be held only in that capacity.

11. A check is often given in settlement of an obligation. On such an occasion the receiver has a distinct duty to perform. He should present it within a reasonable time to the bank on which it is drawn for payment. If this is not done, and the bank should fail, the holder of check would be the loser. The debtor has given him an order on a bank in which he has money, which it is the creditor's duty to collect within reasonable time. It is not reasonable to hold the debtor always liable for the money.[1]

12. When the check or note thus given is not paid on due presentation, the creditor can collect the original debt if he desires, as this remains against the debtor as if no note or check had been received.

13. If one owes several debts to his creditor and makes a general payment, the question sometimes arises how shall the money be applied? First, the debtor can designate how it shall be, and if he does not, then the creditor can apply it to whatever debt he pleases; if he makes no application then the law has established some rules. These are, first, if the debts bear interest and none has been paid, the money must be applied first to that and then, if a balance remains, to the principal. If there are several items

[1] See Vol. II., § 48, p. 574, for the rules relating to the time when checks must be presented for payment.

the money must be applied to the oldest. Again, if there are several claims secured in different ways, the law applies the money to the oldest secured claim; and if a surety is holden on this he also may insist on this application of the money, and should the amount be sufficient he would be discharged. The money will not be appropriated in the way most advantageous to the creditor to the loss or injury of a surety; on the other hand, he cannot require a general payment applied to the last debt on which he may be the holder, regardless of the interests of the creditor.

14. The application by a bank of funds in its possession belonging to the maker of a note *payable there* may next be considered. In most states such a direction in a note is regarded very much like a check. It is an imperative order to pay the note. By the Negotiable Instruments Law, "where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

15. In other states to such a note a different rule applies. The bank may exercise its discretion in paying it. The bank may take a risk of collecting the note, and permit the depositor to withdraw his deposit. In most states banks pay, when depositors have sufficient funds, and are protected by the law in so doing. In the smaller number this right or duty is withheld from them.

16. In no case, except that of insolvency, can a bank pay an unmatured note of a depositor.

17. Nor can a depositor of trust money, which is

known by the bank to possess this character, though deposited in an individual name, be applied to the payment of the depositor's obligation.

18. In some of the states, if the note has been endorsed or guaranteed, the bank has no discretion, and must apply the maker's deposit on his obligation, though a neglect or mistake to do so does not relieve the maker from payment. This is quite similar to the rule that requires a creditor who has the means for paying his debt to apply it in this manner. The note is in effect a draft or order on the bank in favour of the holder and discharging the endorser. This rule, however, does not apply to a note payable at a bank and presented there after its maturity. Its payment is not required for the protection of the endorser. If, therefore, no application of the depositor's money is made, the endorser is not discharged. Generally, a bank declines to pay a note that is presented overdue, but no prohibitory rule against doing so has been established except in those states, a few in number, in which a bank is forbidden from paying the notes of its depositors without specific direction.[1]

19. When a depositor has made a special application or appropriation of his disposit, and has notified the bank of his action, it cannot charge off a note against his deposit, for a man may do what he will with his own so long as he retains control over it.

20. Again, if the maker's deposit is insufficient for this purpose, must the bank apply it in part payment of his obligation? Perhaps the same rule should

[1] See 1 Daniel, on Neg. Inst., Sec. 326b, for authorities.

be applied to a note that is applied to a check — the deposit can be paid whenever the holder is willing to receive the same.

21. Next may be considered the question, where shall payment be made? In promissory notes the place of payment is often mentioned. If the maker of a note is at the place mentioned during business hours of the day of payment, and the creditor is not present, all persons who have endorsed it are discharged, but the maker will remain liable. Thereafter the debt will be regarded as payable at the payee's residence, or wherever he may be found by the maker. The maker's liability is the same as it would be on a note payable on demand, having no place of payment specified. If no place of payment is mentioned payment must be made at the residence or place of business of the creditor. It is not the creditor's duty to find his debtor and demand payment; on the other hand, the debtor must find the creditor and pay him.

22. Next we may inquire to whom, besides the principal creditor, may payment be made. First, we remark, to an attorney who is employed to collect the debt. This, however, does not necessarily justify payment to the attorney's agent. Second, payment may be made to any agent of the creditor who is authorised to receive payments in the ordinary course of business, or to a person who appears to be authorised to do the creditor's business, whom the creditor permits to assume such appearance. Third, payment may be made to a trustee, or to one of several executors.

Fourth, to one of several partners. Payment may be safely made to one after the other partners have forbidden the debtor to pay him.

23. What is the effect of part payment? If this is made before a debt is due and received by the creditor by agreement that it shall be in full discharge, it is effective. The receipt also of something beside money in satisfaction of a debt, though apparently inadequate in value, is a good payment. So is the acceptance of a new security, even though for a less amount, taken by agreement in full payment of the debt.

24. Again, when only a part of a debt is paid in money and the creditor gives a discharge, under seal, of the whole debt, he cannot collect the balance. In some states it has been questioned whether, if such a discharge or receipt is given without a seal, the debt is paid. The reason is that a payment of only part of the money cannot properly be deemed a consideration for the discharge of the whole debt. But a release or a receipt therefor under seal by the creditor, even though it be of a part for the whole, will be effective, and, in some states, even though the receipt is not under seal, discharges the debt.

SUBDIVISION 7. INTEREST

1. What is usury.
2. Penalty for taking more than the legal rate.
3. The tendency is to diminish the penalty.
4. Double ground on which interest may be demanded.

5. On what debts interest is allowed.
6. The same subject.
7. When interest begins on a note payable on demand.
8. Modes of escaping usury.
9. Notes purchased.
10. Difference between discount and interest.
11. The legal rate when parties live in different places.
12. What rate can be collected when no place of payment is specified in a note.
13. Interest on notes and other obligations paid in instalments.

1. Interest means the payment of money for the use of it. In most civilised countries this is regulated by law. It declares how much money may be paid and received as a maximum for the use of money. This is called legal interest. If more is paid, or an agreement is made to this effect, it is called usurious interest. By interest, therefore, is commonly meant legal interest, and by usury, usurious interest. Formerly the regulations concerning the rate of interest were more strictly enforced than they are at the present time.

2. When more than the legal rate is taken, as both are parties to the transaction, neither ought to suffer in consequence of the conduct of the other. This feeling has become so general that only now and then does a borrower attempt to enforce the law against the lender, knowing that public sentiment is opposed to his action.

3. The tendency of the law has been to diminish the

penalty for taking usury. There was a time when the lender forfeited all the interest as well as the principal whenever he made a loan of a usurious character. Now, the penalty, in most states where a usury law exists, is only the forfeiture of the interest, or of the excess beyond the legal rate.

The provision of the national banking law is peculiar. A bank may take any rate prescribed by the state where it is located; and where no rate is fixed it is limited to 7 per cent. If it has taken more than the proper rate the borrower may recover "twice the amount thus paid"; if more than the proper rate is to be paid the entire amount of interest is forfeited.

4. Interest may be due and demanded by a creditor, either because the debtor has agreed to pay it, or because the creditor has sustained a loss through the debtor's withholding money that is due. Indeed, it is a well-known rule of law that, whenever money is withheld which is clearly due, the debtor is regarded as having promised legal interest for the delay. The usage of trade and the customary course of dealings between parties have great influence in these matters. Thus, in New York, the courts long ago decided that a buyer who knew that it was the uniform custom of the seller to charge interest after six months on articles sold without payment could be compelled to pay interest after that date.

5. In general, interest is allowed on a debt that is due by a judgment of a court; and on a settled account, from the day of settlement; on goods sold, from the time of the sale, if no credit has been given, and, if

there has been, from the day of expiration of the credit; on rent, from the time it is due; also on money paid to another or lent to another, from the time of paying or lending it.

6. Many questions have been raised with respect to the collection of interest on various kinds of debts. Besides those mentioned a few others may be noticed. For example, a city is not liable for interest on its bonds after they have matured, provided the funds are ready to meet them at maturity. It is not required to seek the holder and tender to him the money. On the other hand, it is his duty to demand payment of the obligation at the time fixed for its payment. If he does not there is no reason why the city should be required to pay continuing interest.

7. It sometimes happens that money is due, but is not payable. Thus, the money on a note payable on demand is always due, but it is not payable until the holder demands it; and does not draw interest until he has demanded payment. But a note payable at a fixed time carries interest from that date whether it is demanded or not.

8. There is no special form or expression necessary to make a bargain usurious. Formerly, when the usury laws were more generally enforced than they are now, there were various methods adopted for evading the law. One of the most frequent ways in borrowing from banks was to agree that a considerable portion should remain on deposit. The effect of this was really to borrow a much smaller sum than that on which interest was paid. It was very difficult to trace usury

in this proceeding. Another common way was to solicit a loan through another person to whom a commission was paid, which was divided between the solicitor and the lender. In this way the lender received a larger sum for the use of his money than the rate of interest specified.

9. Often this question had been raised on a note sold to a third person. Of course, the owner has a good right to sell it for any price he pleases, and when this is done in good faith, in other words, when the sale is real, there is no taint of usury in the transaction. But sometimes a sale is merely for the purpose of obtaining more than the rate of interest, and then the transaction is tainted with usury. Usually, a person who makes his own note and sells it for what he can get is a borrower rather than a vendor, though the transaction has the appearance of a sale.

10. It may be remarked that banks, in discounting notes, do not actually discount them; they simply collect interest in advance on the money loaned. In discounting a note such a sum is given to the borrower as will, at the end of a specified period, at an agreed rate of interest, amount to the sum he is to pay at the end of that period. Suppose one wished to have a note discounted for $100 at a bank, payable in one year from date, what would the bank do? If the legal rate were 6 per cent., the bank would return $94 to the borrower, expecting that at the end of the year he would pay $100. Suppose the bank should agree to discount the borrower's note for that period at 6 per cent. interest, what would the borrower receive?

Something more than $94, for the reason that this sum, at 6 per cent. would not amount to $100 at the end of the year. The bank must give him $94.34, for the reason that this sum, at 6 per cent, interest, would only amount to $100 at the end of the period. The taking of interest in advance, although not true discount, has been regarded for a long period as legal.

11. The rule prevails everywhere that the parties may contract for the rate that prevails at the place where either party resides. Thus, if a lender resides in Ohio, where the legal rate is 6 per cent., and the borrower lives in Iowa, where the legal rate is 8 per cent., a contract would be legal specifying the higher rate of interest.[1]

12. Generally, a note is made payable at a particular place, but not always. When an omission occurs then it is payable at the place where it was made, and bears the rate of interest established by the law of the place of its birth.

13. When a note, bond or other security is paid in instalments, the interest may be computed in three ways. One way is to compute interest on the whole sum to the day of payment, and also on each instalment from the time it was paid to the time of making the final payment; and the difference between the instalments paid and the interest thereon, and the principal sum and the interest thereon, is the amount due.

[1] If a bill or note bears usurious interest both by the law of the place where it was made and of the place where it was payable, the legal consequences of disregarding the law of both places to be visited on the offender are those of the place where the instrument was made.

Another way is to compute interest on the whole sum to the time of the first payment, and add this to the principal, and then deduct the instalment; repeating the operation whenever an instalment is paid until the time of final payment. The objection to this way is, if the instalment is not equal to the interest earned and computed on the principal sum at the time of paying the instalment, interest is thereafter earned and computed on interest, and the creditor therefore receives compound interest. To obviate this objection the third way is to compute the interest on the principal sum from the time when interest became payable to the first time when a payment or payments with the interest computed on them shall equal, or exceed, the interest due on the principal. Then this sum is deducted therefrom, and future interest is computed in the same manner as before. By this method payments are applied, first, to reduce the interest, and secondly, to diminish the principal of the debt; and the creditor does not receive compound interest. Many of the states, by statute, have established a mode of computing interest on obligations paid by instalments.

SUBDIVISION 8. DAMAGES FOR NON-FULFILMENT OF CONTRACTS

1. Guilty party is liable.
2. Deceit.
3. Passive concealment is not deceit.
4. To obtain redress what must be shown.
5. Modes of practising deceit.

6. It must be sufficient to influence a person.
7. It must be false.
8. Deceit in statements of directors.
9. Deceit concerning credit.
10. Deceit in use of trade-marks.
11. Deceit growing out of a partially false statement.
12. Non-liability when information is open to both parties.
13. Deceit concerning statements of law.
14. How fraud may be proved.
15. Damages in cases of written contracts.

1. In neglecting or declining to execute contracts one party or the other is often guilty of a legal wrong. In any event the guilty party can be compelled to respond in damages for not fulfilling his undertaking.

In other cases the failure to execute is excusable, or is the result of an agreement or understanding between the parties.

2. Deception or deceit is one of the wrongful elements surrounding or inhering in a contract. A person deceives another in making or not fufilling a contract, and then the injured party may sue for damages for the wrong inflicted on him. The question in this large class of cases is whether the deceit is of such a nature that the law will recognise it and make the wrong-doer responsible to the other for the injury he has sustained.

A representation must be distinguished from a warranty. A warranty is a representation, but there are many cases of representation in which no warranty was

made or intended. Setting aside the cases of warranty for consideration elsewhere,[1] we will take up the cases of representation pure and simple, and consider which are, or may be, the subject of a legal action.

3. A passive concealment or withholding of information does not always form the subject of an action. For example, a person learned of a declaration of peace between this country and Great Britain in 1815. Furthermore, he knew that the effect of this peace would be to greatly enhance the price of tobacco. Acting on this information, he bought a large quantity from a person who was ignorant of this welcome news, though, as the sequel proved, it was not welcome to him. After making peace, the price rapidly advanced, and the seller was unwilling to execute his contract. His defense was deceit, but the court decided against him, saying that it was not the buyer's duty to impart his news to the other party; his ignorance was his own affair, for which the other was not responsible.

Another case may be given — that of a man who buys land knowing there is a coal mine underneath, of which the seller is ignorant. The buyer keeps his knowledge to himself, until after the purchase when the other, deeply chagrined, brings his action for deceit. Clearly enough, as there has been no deceit, there can be no recovery.

4. To obtain redress it must be shown, first, that there has been a false representation of something material; second, that the person who made it knew that it was false; third, that the other person to the

[1] See Section 3, Subdivision 3.

contract who suffers thereby was ignorant of its falsity and believed it to be true; fourth, that it was made with the intention that the other party should act upon it; and, lastly, that the party thus acting has been injured. Thus, a person who is induced to endorse a promissory note before its maturity by reason of a false representation cannot maintain an action against the maker for doing so until he has been compelled to pay the note. All of these elements are needful to make out of the deceit a legal wrong.

5. Deceit can be practised in various ways. A nod of the head or some particular movement, silence, a sign — in all cases there must be a clear act of some kind to effect this purpose. The highest authority on this subject says that, to constitute a representation, it is not necessary, in using language, that the statement should be made in terms expressly affirming the existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of ordinary intelligence, to suppose the existence of a particular state of facts, that is as much as if statement had been made in exact terms.[1]

A fact must be stated. This must be distinguished from an expression or some half-vague knowledge. On this point the cases are often confusing. By the modern law a mere impression is not enough; in some way the plaintiff must have been misled by the other party, and intentionally so, to create such a representation as the law will recognise as wrongful.

6. The statement must influence the conduct of a

[1] Bigelow on Torts, § 121, p. 60, Seventh Edition.

man of ordinary intelligence. This point is of great importance. A person may go into a store with a view of purchasing a piece of cloth, and inquire of the seller the composition of the piece that pleases him. Suppose the seller, as often happens, is quite ignorant of the nature of the fabric in question, and should state wrongfully its composition, would the other person have an action for deceit against the seller? This depends on the question whether the buyer is deceived and suffers injury.

Mr. Bigelow says: "In ordinary cases the representation must be such as to influence the conduct of a man of average intelligence, but the courts do not turn over the simple-minded man to be the prey of rogues. If a person is mentally deficient, or is but a child, the court will protect him from designing men where they would leave others to their own folly."[1]

Two cases may be supposed, which doubtless happen every day. The one is that of an ignorant seller who unintentionally makes incorrect representations concerning the article of sale; the other is that of an intentional misrepresentation. In both, as often happens, if the buyer knows more about the subject of the sale than the seller, he is not deceived, and therefore has no legal action against the other — even though the seller may have lied deliberately throughout the transaction — for the simple reason that the buyer has not been deceived. It is not enough, therefore, to make a wrongful representation; it must be

[1] See § 12.

effective in deceiving and injuring the buyer in order to give him a right of action.[1]

7. A statement made by a seller with the view of influencing the buyer's conduct, and having that effect, if it is false and injures him, is actionable. To show that the statement was false either in law or morals will not suffice; an injury or damage must be proved to give a remedy. Such a statement may possess many different characteristics. Suppose a landlord should say to one who was negotiating for the purchase of his house, that he rented it for so much a year, when the truth was otherwise, the statement would be actionable. In like manner a statement giving the false age of a horse, or his speed, falls under the same head. Also, a statement concerning the number of acres contained in a lot of land, if it prove to be false. These are a few examples from a large number of cases that might be given.

Moreover, the defendant cannot escape liability by showing that the words might be true if taken in a forced or unnatural sense. The other party has a reason for regarding the words in the sense in which they are ordinarily used, and this is the way the law looks at them as already stated.

8. Cases not infrequently occur in which a person permits his name to be used as a director or trustee of a company that issues a prospectus containing false representations. How far is such a representation binding on him? In other words, to what extent can he be made answerable for the damage done to the

[1] § 133, p. 62.

person, who, relying on such representation, has been led to enter into some business engagement resulting in loss to him. In one of the leading cases in this country it has been declared that, though such a prospectus be false, it does not impose on the director in law the duty to know the truth of the statement and to subject him to liability therefor. Of course, a director who knows that the prospectus is false would be liable for the consequences, but the law does not impose on him the duty of knowing whether a prospectus or other statement is true or otherwise.

This rule, however, is surrounded by some limitations. A director cannot always plead ignorance. In many cases it is his duty to know, and he is responsible if he does not ascertain the truth. Thus, while the law does not require a director to make a careful examination of the bank reports sent to the national controller of the currency, to ascertain their entire truth, yet he cannot wilfully close his eyes and make no examination whatever concerning the truth of the statement.

The cases of false statements put forth by directors are multiplying. Some of the statements are made for the purpose of deceiving the public and enabling directors to dispose of their stock at an advantage. The law brands all such attempts as frauds, and those who make them are liable therefor.

9. Not infrequently persons are asked concerning the ability of others, or whether they are entitled to credit or not. Bank officials, for example, are frequently asked by customers desiring information of

this kind. The books of late years contain numerous cases in which such information has proved to be misleading, and those who have depended thereon, perhaps in a fit of anger, have endeavoured to recover for their loss from the cashier or other person who has innocently drawn sellers into trouble. The courts have been quite uniform in declaring that, in such cases, the persons making such statements are not responsible or liable for an action in damages, except when the proof shows that they have intentionally misled others.[1]

Another example which may be given is that of a person who is about to supply a man's son with goods on credit, and who inquires concerning his property, and is told that he is worth $5,000; but the informant says nothing concerning the son's indebtedness. In one sense the answer given is correct; the son has this amount of money; nevertheless, in another sense, the representation is false, and the person who makes it is responsible for his deception, should the other suffer thereby.

10. The long-continued exclusive use of a trade-name, though primarily intended to be descriptive of the quality of the product, entitles the user to protection against its unnecessary adoption and use by another which is calculated to deceive purchasers, the use having been retained for that purpose. Thus, a complainant had for eighteen years made and sold food products under the name of the Health Food Company. During this time the name had become

[1] See the recent case of Taylor v. Thompson, 176 N. Y., 168.

widely known and identified with his products. Then another manufacturer of similar products adopted the name Sanitarium Health Food Company. The court decided that, although the use of the latter was accompanied by no similarity of packages and the place of the manufacture shown thereon was different, it was calculated to deceive purchasers and constituted unfair competition, as there was no necessity for its adoption. The complainant, therefore, had good cause against the other party for relief.

11. There may be deceit growing out of a partially false statement of a matter. For example, a man who is desirous of buying stock of a woman who knows nothing about the value tells her of a fact calculated to depreciate its value, but omits to tell her of other facts within his knowledge of an opposite character. This is a misrepresentation for which an action would lie.

12. A seller is not liable for deceit when the means of information are equally known to both parties as already stated.[1] Thus, a person who goes into a store to buy a bushel of potatoes that are in a basket before his eyes cannot complain legally should half of them prove to be unsound, unless he inquired of the seller at the time of buying them, and their soundness was falsely represented.

(*a*) This principle has a wide application. Of late years the judicial tendency is to make a seller liable in most cases wherein it would not be easy for the purchaser to make an examination of the nature of the

[1] See § 6.

purchase for the purpose of proving or disproving the truth of the seller's statement. Thus, should a seller say to a buyer concerning a piece of land which was the subject of contract that it was free from encumbrance, and that the title was all right, and make other representations of like character, the buyer could ascertain the truth or falsity by making an examination of the records, if he pleased. Therefore, if he chooses, he can trust to the statement of the seller and hold him liable for any misstatements.

(*b*) It is not easy to distinguish between the cases in which the buyer ought to make some examination and those in which he is not required to make any. As time nowadays is an important element in the life of every person, he is not required to make examination in those cases where this cannot be done without considerable loss of time and inconvenience. But this rule does not apply to all matters. Thus, were the purchaser of a ship told by the seller that it was sound and correct in every respect, the law would, nevertheless, require the buyer to make some kind of examination. As the sale is important, the law imposes a duty on him to do something in the way of ascertaining the truth of the seller's statement.

(*c*) There are many cases in which the buyer is wholly ignorant of the nature and quality of the thing sold, and must trust to the seller's statement. This is particularly so in buying precious stones and other subjects into the examination of which great skill or technical knowledge enters. In such sales the statement made by the seller goes farther than in other

sales wherein the buyer also possesses some knowledge concerning the nature of the things purchased.[1]

(*d*) A seller who covers up a thing in such a way as to prevent the buyer from having as good knowledge as he himself possesses commits a wrong for which he is responsible. Thus, the owner of a ship who intentionally covers up defective places so that it will be difficult for the buyer to see them, who is thereby misled concerning its worth, is liable to an action by the buyer for the fraud that has been practised on him.

(*e*) To a contract in writing this principle does not apply. In such cases the court demands of both contracting parties that they should have knowledge of the instrument, and, if the buyer is misled, it is his own fault in not reading the paper. Surely, there is no ground for neglect or excuse for deception on his part.

13. Next may be considered the effect of misrepresenting the law that applies to a proposal contract. Whatever representation a person may make concerning this is not binding in any way, and cannot be the subject of an action of deceit because it is presumed, for the safety of society, that all understand the law.

But a person having superior means of knowing the law, and professing to know it, though not a lawyer, who should knowingly give information to influence the conduct of an ignorant person, would be liable for an actionable misrepresentation. Thus, an old citizen who professes to be familiar with the land titles of the country meets an immigrant and proposes to

[1] See Subdivision 3, § 6.

sell to him a piece of land, assuring him that the title is good. It is true that the immigrant could examine the title, or employ an agent, and thus assure himself of its truthfulness. Should he, instead of doing so, trust to the representation, which should prove to be false, he would have an action against the person who made it.

14. Fraud may be proved in several ways: First, by showing that the defendant made a representation, knowing that it was false; second, that he made it recklessly without knowing whether it was true or false; third, that he made it positively of his own knowledge when he only believed it to be true without having actual knowledge; fourth, that he made it under such circumstances that it was his duty to know whether the representation was true or not.

15. The damages for not fulfilling a written contract depend on different principles. Very often the contract itself states what damages shall be incurred by its non-fulfilment.

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